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No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner,

VS.

SECRETARY, DEPARTMENT OF THE INTERIOR,
Respondent.

VS.

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Respondent-Intervenor.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KRONICK, MOSKOVITZ,
TIEDEMANN & GIRARD
A Professional Corporation
*FREDERICK G. GIRARD
JANET K. GOLDSMITH
ROBIN L. STEWART
ANDREA M. MILLER
COUNSEL OF RECORD*
770 L Street, Suite 1200
Sacramento, CA 95814
Telephone (916) 444-8920
Attorneys for Truckee-Carson Irrigation District

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1. Whether Truckee-Carson Irrigation District, a special district wholly comprised of and financed and governed by the landowners in the Newlands Reclamation Project, has standing to challenge the validity and enforcement of the federally promulgated Operating Criteria and Procedures for the Newlands Reclamation Project based on the injurious impact of those Criteria on its constituent project landowners.

2. Whether a district court, in an action to review administrative regulations, has the power validly to formulate and order promulgation and enforcement of specific regulations over the objection of the executive officer to whom Congress has entrusted rulemaking authority, and whether purported regulations so promulgated can be enforced to abrogate the rights of persons not otherwise within that court's jurisdiction.

3. Whether the Reclamation Act or any other provision of law authorizes the Secretary of the Interior to adopt rules and regulations which reduce reclamation project water diversions to less than the amount needed to satisfy the beneficial use requirements of the project landowners, and which impose on those landowners costs beyond their ability to repay.

4. Whether the courts below erred in finding that the Truckee-Carson Irrigation District has no protectible Fifth Amendment rights under the Orr Ditch Decree, the Truckee River Agreement, and/or the 1926 Project Operating Contract.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 742 F.2d 527, and reproduced in the Appendix at pages 1 to 10. The unreported decision of the district court, entered August 18, 1983, is reproduced in the Appendix at pages 11 to 32. The holding of the district court was subsequently clarified by its Order entered October 26, 1983, which is reproduced in the Appendix at pages 33 to 34.

JURISDICTION

The Court of Appeals' decision herein was rendered on September 10, 1984. Petitioner Truckee-Carson Irrigation District filed a timely Petition for Rehearing which was denied on October 31, 1984. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty or property without due process of law.

Section 10 of the Reclamation Act of June 17, 1902, provides:

> The Secretary of the Interior is hereby authorized to . . . make such rules and regulations as may be necessary and proper for the purpose of carrying out the provisions of [the Reclamation Act of June 17, 1902 and Acts amendatory and supplemental thereto]. (43 U.S.C. § 373.)

Section 8 of the Reclamation Act of June 17, 1902, provides:

> Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right. (32 Stat. 390; 43 U.S.C. §§ 372, 383)

The case also involves the "Operating Criteria and Procedures for Coordinated Operation and Control of the Truckee and Carson Rivers for Service to Newlands Project," found in *Pyramid Lake Paiute Tribe v. Morton,* 354 F.Supp. 252, 262-266 (D.D.C. 1973), and set forth verbatim in the Appendix hereto at pages 94 to 102.

STATEMENT OF THE CASE

A. Introduction

This case presents yet another round in the never-ending tug-of-war between the Pyramid Lake Paiute Tribe of Indians [hereinafter "the Tribe"] and their upstream neighbors, the Newlands Project farmers, over their relative rights to the waters of the Truckee River. In this case the project farmers, represented by petitioner Truckee-Carson Irrigation District [hereinafter "TCID" or "the District"],[1] sought to have invalidated and to

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[1] Truckee-Carson Irrigation District is a political subdivision of the State of Nevada. Its constituents are the farmers and landowners of the

prevent the enforcement of project Operating Criteria formulated and mandated by a distant court in a lawsuit to which they were not parties. The Criteria operate to reduce the project's diversion entitlement to Truckee River flows in order to provide the Pyramid Lake Paiute Tribe with additional water above that decreed to it in a 1944 comprehensive water right adjudication of the Truckee River. *See United States v. Orr Water Ditch Co.*, Equity A-3 (D.Nev. 1944); *Nevada v. United States*, . . U.S. . ., 103 S.Ct. 2906 (1983). The allowable diversion established by the Operating Criteria is significantly less than the amount necessary to satisfy the vested rights of the project farmers, as determined by two court decrees and the practical experience of more than half a century. In the decisions below, the district court and the Ninth Circuit Court of Appeals upheld the validity of the challenged Criteria and refused to enjoin their enforcement against TCID and the project farmers.

B. Genesis of the Newlands Project Operating Criteria: The Tribe v. Morton Case

The seeds of the instant dispute are found in litigation brought by the Tribe in 1970 against the Secretary of the Interior [hereinafter "the Secretary"] in the District of Columbia District Court.[2] In that action, the Tribe sought judicial review of Operating Criteria which had been devised by the Secretary as regulations governing TCID's operation of the federal Newlands Reclamation Project pursuant to its contract with the United States. App. 36-

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federal Newlands Reclamation Project. The District was organized by the Newlands Project farmers to deal with the United States on their behalf in matters concerning the operation of the Newlands Project.

[2] *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252 (D.D.C. 1973), hereinafter referred to as "*Tribe v. Morton*".

74.[3] The Tribe asserted that the Secretary's Operating Criteria permitted TCID to divert more water than it was entitled to divert, and permitted wasteful use of water by the Newlands Project farmers. Permitting such allegedly excessive diversions unnecessarily depleted the Truckee River flows needed for maintenance of Pyramid Lake located on the Tribe's Reservation downstream, the Tribe contended, and thus violated the Secretary's fiduciary duty to the Tribe. 352 F.Supp. at 257.

The Tribe did not join TCID or its farmers as parties to the action, and it opposed the Secretary's motion to have the matter either dismissed for failure to join indispensable parties or transferred to the District of Nevada District Court. The District of Columbia District Court declined to transfer or dismiss, and the case proceeded despite the absence of the farmers and TCID.

The *Tribe v. Morton* court found the project diversion allowance of the Secretary's Operating Criteria to be arbitrary and unreasonable, holding that it unnecessarily deprived the Tribe of water by failing to prevent the

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[3] Shortly after its formation, on December 18, 1926, TCID and the United States entered into a contract [hereinafter "the operating contract"] pursuant to which the Newlands Project works were transferred to TCID's care, operation and maintenance. The 1926 operating contract preserved the right of the Secretary of the Interior to "make reasonable rules and regulations . . . as may be deemed proper and necessary to carry out the true intent of the law and of this contract," and the District agreed that "in the operation of the transferred works, all such rules and regulations will be fully adhered to." App. 66. It reserved the United States' right to terminate the contract for breach of its provisions. Finally, the operating contract provided that "[T]he lands of the Truckee and Carson Divisions shall have a prior right to the economical and beneficial use of all such waters in sufficient quantities to properly irrigate 87,500 acres of land and until such priority has been satisfied none of the waters of the [Truckee and Carson] streams shall be diverted or impounded by the United States for use upon other lands." App. 67.

project's wasteful use of water,[4] and by relying solely on the *Orr Ditch* decree,[5] to the exclusion of the *Alpine* Temporary Restraining Order,[6] in calculating the amount of water which could be diverted from the Truckee River for the Newlands Project. 354 F.Supp at 256-57. The court then invalidated the regulations and ordered the Secretary to submit amended regulations to it for consideration. The Secretary was directed to either assure annual delivery of 385,000 acre feet of Truckee River water to Pyramid Lake,[7] or explain his failure to do so

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[4] In TCID's absence, the Tribe's allegation of project water waste had gone unchallenged by the Secretary. Not surprisingly, on that uncontested record, the court found that such waste had been "conclusively" shown by the evidence. *See* n. 6, *infra*.

[5] *United States v. Orr Water Ditch Co.*, Equity No. A-3 (D.Nev. 1944) [hereinafter *"Orr Ditch"*], was a comprehensive adjudication of Truckee River water rights, binding on the Tribe and on TCID and the Newlands Project farmers. *Nevada v. United States, supra,* .....U.S. at ....., 103 S.Ct. at 2925. The *Orr Ditch* decree provided a water duty of 3.5 acre feet per acre [hereinafter "afa"] for bottomlands and 4.5 afa for benchlands within the Newlands Project.

[6] *United States v. Alpine Land & Reservoir Co.*, 503 F.Supp. 877 (D.Nev. 1980), *aff'd* 697 F.2d 851 (9th Cir. 1983) [hereinafter *"Alpine"*], in which TCID participated as a party, representing the project farmers, was a comprehensive adjudication of the water rights of the Carson River in Nevada. The Carson River is in a different watershed from Pyramid Lake. The *Alpine* Temporary Restraining Order provided a water duty of 2.92 afa for the same project lands governed by the *Orr Ditch* final decree. The *Alpine* final decree, however, held that 3.5 and 4.5 afa water deliveries were reasonably required to satisfy the beneficial use needs of the Newlands Project. The contention that the Newlands Project farmers were wasting water was adjudicated and rejected by the *Alpine* court, whose determination was upheld on appeal.

[7] The *Orr Ditch* final decree, in contrast, had awarded the United States approximately 30,000 afa for use on the Pyramid Lake Reservation.

and provide a plan to accomplish that end "in the immediate future." *Id.* at 258.

When the Secretary's proposed amended regulations failed to assure the delivery directed by the court, the court rejected his submission and invited the Tribe to submit its own proposal for Operating Criteria. The Tribe's proposed Operating Criteria were adopted almost verbatim by the court, *see* App. 4, which then entered its final Memorandum and Order, directing the Secretary to "publish and implement and enforce" them. 354 F.Supp. at 261; App. 92.

While the *Tribe v. Morton* court's Order purported not to interpret or affect rights accorded by either the *Orr Ditch* or the *Alpine* decree, 354 F.Supp. at 262, in fact it reduced diversions to Newlands Project lands from the 406,000 acre feet previously established by the Secretary's regulations [8] to a maximum of 350,000 acre feet for the then-current water year, and 288,129 acre feet per year thereafter,[9] a reduction of nearly one-third. Finally,

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[8] TCID has never conceded that the Secretary is authorized by the Reclamation Act to control diversion levels by regulation. *See* pp. 22 to 27, *infra*. However, it complied with those limits so long as they permitted TCID to supply the project farmers with sufficient water to satisfy their needs for beneficial use.

[9] This diversion limit was derived by applying the 2.92 acre foot per acre water duty contained in the *Alpine* Temporary Restraining Order while ignoring the 3.5 to 4.5 acre foot per acre water duties established for the same acreage and guaranteed the Newlands farmers by the *Orr Ditch* Final Decree. The Ninth Circuit was well aware of the substantial invasion of the farmers' vested rights effected by the Criteria's diversion limit. In its earlier *Alpine* decision, it had acknowleged that imposing even the more generous water duty of 3 afa "would drastically reduce the farmers' yields." 697 F.2d at 857.

the court-adopted Criteria required that TCID's operating contract be terminated should the District "substantially violate" any of the Criteria. *Id. See also* App. 4, 31, 101.[10]

The Secretary immediately requested that the Justice Department appeal the court's Order. App. 106-107. The Justice Department refused without comment. App. 31, 108. In obedience to the court's Order, the Secretary published its Judgment and Order setting forth the mandated Operating Criteria in the Federal Register on March 12, 1973. App. 89-102.

When, to satisfy its contractual and fiduciary obligations to its constituent project farmers, the District diverted more Truckee River water than permitted by the Operating Criteria, the Secretary, by letter of September 14, 1973, notified TCID of the termination of its operating contract, App. 109-113, as mandated by the *Tribe v. Morton* court's Order. App. 31.

C. Challenge to the Operating Criteria: Trial Court Proceedings In This Action

Following the Secretary's notice to it that the Operating Criteria were being enforced by termination of TCID's operating contract, TCID, on its own behalf and on behalf of its constituent farmers, filed this action in the District Court for the District of Nevada, App. 114-141, invoking the jurisdiction of the court pursuant to 28 U.S.C. § 1331(a). It sought a declaration of rights concerning the validity and applicability of the court-ordered

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[10] The court directed that additional operational measures be imposed on TCID to minimize its water demand. TCID has objected to many of these measures as unauthorized by the Reclamation Act because they would, if implemented, require expenditures of funds far beyond the payment capacity of the farmers who own the project land. *See* 43 U.S.C. §§ 485; 485b-1; 390; 485h(a)(3); 504.

Operating Criteria, and challenged the Secretary's termination of its contract for their violation.

TCID contended that the Operating Criteria could not be applied to the operation of the Newlands Project for several reasons. First, the Criteria were not the product of the administrative discretion of the Secretary of the Interior to whom Congress had entrusted rulemaking authority over Reclamation projects, but were rather a court order. Second, the *Tribe v. Morton* court's order could not constitutionally be applied to limit rights of the non-party project farmers or the District. Third, whether analyzed as a court order or as "regulations", the Operating Criteria were unauthorized by law for they operated to deprive TCID and its landowners of vested water rights guaranteed them by the *Orr Ditch* final decree and to deny water needed for beneficial use of project lands, contrary to the specific mandate of the Reclamation Act. Finally, TCID contended that its failure to comply with the unauthorized and inapplicable Operating Criteria could not constitute a breach of its contractual obligation so as to justify termination of the operating contract.

D. The District Court Decision Below

Paradoxically, the district court both recognized and ignored the central issue in TCID's challenge to the Operating Criteria—the fact that they were judicially formulated and imposed upon absent non-parties.

The court's opinion began by acknowledging that "the operating criteria challenged in the present case were formulated and approved by the Court in *Tribe v. Morton*." App. 20. It described the *Tribe v. Morton* action as follows:

> This action poses a unique case procedurally and juridically. We do not question the right of the Paiute Tribe to attack the 1972 operating criteria as arbitrary, capricious and an abuse of the Secretary's

> authority. The Tribe chose to do so by action in the District Court for the District of Columbia, naming only the Secretary of Interior as a defendant. It chose not to name as defendants its true opponents, the Lahonton [sic] Project farmers represented by the TCID. The district court chose not to require the joinder of the TCID. The TCID chose not to intervene as a real party in interest. Thus, the action proceeded as an ex parte action in a substantial sense, the Secretary of Interior being pretty much in the position of a stakeholder. The final result was the promulgation of the 1973 operating criteria at the direction of the court. The Secretary was unquestionably subject to the jurisdiction of the court, and was in jeopardy of contempt if he disdained to comply. The Department of Justice refused to appeal.

App 30-31. The court expressly noted that

> This is not the normal case of rules and regulations promulgated in the implementation of a government contract. . . .

App. 31.

Having thus recognized that the Operating Criteria were not the product of administrative rulemaking, the court nonetheless proceeded to ignore this critical fact and to evaluate them as though they were. Avoiding the central issue entirely, the court performed only a limited review under the dictates of *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), and found that since the regulations "were promulgated by the Secretary under the guidance of Judge Gesell"—who also determined that they were "consistent with the Secretary's

legal and fiduciary obligations"—it was clear that "relevant factors were considered and that no error in judgment was made." App. 24.[11]

The trial court rejected TCID's contention that the court-mandated enforcement of the court-ordered Operating Criteria against non-parties violates the due process rights of TCID and its landowners. In fact, it altogether ignored the impact of the Criteria on the farmers' vested water rights which TCID had raised, App. 25,[12] and held only that *TCID* had no constitutionally protected rights. TCID's only right was to manage the project in conformity with the Secretary's rules and regulations which, the

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[11] Even under its limited *"Overton Park"* review, the district court could not endorse the Criteria it refused to invalidate. It noted:

> There are portions of the District of Columbia decree which cause one to ponder. The opinion does not show that the [*Tribe v. Morton* court's finding that] 288,120 acre feet diversion through the Truckee canal would ultimately be adequate was any less of a "judgment call" than the [Secretary's] 1972 allowed diversion of 378,000 acre feet. Also, it is not at all clear to this Court that the District of Columbia Court's directive to the Secretary to invoke the sanctions of Article 32 of the 1926 contract . . . [the termination provision] was within the competence and authority of the judge.

App. 31. And the court felt compelled, in a subsequent order, to correct any impression that it "approved the Operating Criteria," stating that it believed "many aspects of the criteria to be improvident if not unreasonable" and that all it had done by its Judgment was "approve the method of promulgation and declare the criteria to be enforceable against TCID until modified or set aside." App. 33.

[12] TCID had challenged the enforcement of the Criteria on the grounds, *inter alia*, that it would deprive the project landowners of property rights without due process, App. 124, 128-134, 135-136. In their answers, neither the Tribe nor the United States disputed TCID's representational capacity with regard to the project farmers; rather, both denied that the farmers owned any valid Truckee River water rights which were infringed by the Criteria. Consistent with this posture, the Pre-Trial Order also recognized that TCID was in court to vindicate its constituents' rights as well as its own. App. 147, 148.

court held, it had no right to disregard, even if they were unauthorized or invalid. App. 27, 29, 30, 32. Thus, the court found no constitutional impediment to enforcement of the Criteria.

Neither did the trial court, except by implication, address TCID's contention that the Reclamation Act does not empower the Secretary to reduce by rulemaking the farmers' vested water right entitlements to sufficient water for beneficial use. Instead, the court sidestepped this basic issue, stating:

> The Orr Ditch Decree granted the United States the right to divert water from the Truckee River for irrigation of the project. This water is "under such control, disposal and regulation as the [United States] may make or desire". The only limitation on the Secretary's ability to regulate the water supply is an upper limit. Here, the Secretary issued a regulation reducing the amount of water to be diverted. Consequently, the reduction was within the Secretary's authority.

App. 23-24.

In so holding, it ignored its own earlier determination in *Alpine* (pending which it had delayed resolution of this case, App. 12), that beneficial, non-wasteful, project irrigation requires 3.5 and 4.5 afa, which is precisely the amount decreed in *Orr Ditch*, implemented by the Secretary's challenged Operating Criteria, and then radically reduced by the *Tribe v. Morton* court's decree.

E. The Ninth Circuit's Decision Below

In an opinion notable for its dearth of citational authority the Ninth Circuit court managed to affirm the district court's decision. This result was accomplished by denying TCID's standing to assert or protect the collective water rights of its constituent farmers which, as the court was

aware, the Criteria infringed. *See Alpine, supra,* 697 F.2d at 857; *see also* discussion *supra* at 6, n.9. It held:

> Even if the [*Tribe v. Morton*] court did interfere with [the Newlands Project farmers'] water rights, TCID has no Fifth Amendment claim based on this interference because it would not have lost any property as a result of this interference. Only those who would have lost property, the owners of land with water rights, could claim a deprivation of property without due process.

App. 6.

Instead, the court focused narrowly on TCID's rights under its operating contract, which it defined as "limited to managing the project as long as the Secretary's rules and regulations were followed." App. 7. The court conceded that "If this right to manage the Project was taken from TCID in the *Tribe v. Morton* suit, TCID's property, this right to manage, may well have been taken without due process of law. . . ." App. 6.

However, it concluded that because "TCID had no water rights", "[o]nly the nature of its managerial duty was affected. This does not amount to a taking of property without due process." App. 7.

In response to TCID's contention that a court-authored and mandated decree, entered over the Secretary's objection, cannot constitute valid rules adopted by the Secretary, the Ninth Circuit again held that TCID had no standing. The court declared that only the Secretary could seek to vindicate his discretionary rights, and *"he chose* not to appeal", App. 8, emphasis added. In so holding, the court ignored the district court's findings both that the Criteria and their enforcement had been judicially compelled, *see* App. 31, and that the lack of an

appeal had had nothing to do with the *Secretary's* choosing, his request for an appeal having been flatly rejected by the Department of Justice. App. 31.

The Ninth Circuit also rejected summarily TCID's contentions that the Criteria were outside the scope of rulemaking authority granted the Secretary by the Reclamation Act, and contravened the Act's purpose and intent, stating only:

> The Secretary did not exceed his authority when he adopted the operating criteria. In the 1926 contract, the Secretary explicitly reserved the right to issue regulations governing the operation of the Newlands Project. This reservation allowed the Secretary to issue the regulation restricting the amount of water that would be diverted. Similarly, even if the operating criteria were more restrictive than similar conditions under the 1926 contract, this change was within the Secretary's authority.

App. 9.

Finally, the Ninth Circuit held that the Criteria were neither arbitrary nor capricious, for they "were adopted under the direction of the *Tribe v. Morton* court after the court and the Secretary considered the Secretary's obligations to TCID, to the water rights owners, and to the Tribe." App. 9.

ARGUMENT

A. The Decision Below Unsettles Rights Which This Court's Recent Decision in *Nevada v. United States* Finally Confirmed.

This is not the first time that this dispute and these parties have been before this Court. Just two Terms ago this Court affirmed that the *Orr Ditch* final decree protects the Newlands Project farmers' vested water rights

from diminishment for the benefit of the Pyramid Lake Paiute Tribe of Indians. The Court recognized *Orr Ditch* as a comprehensive water adjudication "intended to settle once and for all the question of how much of the Truckee River each of the litigants was entitled to." *Nevada v. United States*, ___ U.S.___, ___, 103 S.Ct. 2906, 2925 (1983). The Court held that the Reservation's water right had been finally quantified in that case and that the Tribe was not free to assert or enforce against the Newlands Project farmers any claim to additional water beyond the amount decreed to the Reservation therein. The decision expressly recognized the project farmers' ownership of their water rights and the Government's lack of managerial authority over those rights. The *Nevada* decision should have brought to an end the farmers' long, bitter, and expensive struggle to secure their rights against the threat of loss for the benefit of the Pyramid Lake Reservation. Incredibly, it did not. Less than two years later, the Ninth Circuit has rendered illusory the protection which this Court's decision gave those rights.

The Ninth Circuit's decision below has accomplished a breath-taking end run around this Court's validation of the farmers' *Orr Ditch* water rights, by upholding and enforcing Operating Criteria which indisputably invade and drastically reduce those rights for the sole purpose of supplying the Tribe with the very water to which this Court just held it is not entitled.

The Operating Criteria formulated by the *Tribe v. Morton* court and approved by the Ninth Circuit in its decision below were designed to "assure delivery of 385,000 acre-feet of water annually to Pyramid Lake," 354 F.Supp. at 258—more than ten times the amount awarded the Tribe in *Orr Ditch*. The express basis of the Criteria was the Tribe's assertion of "well-founded rights." 354 F.Supp. at 256.

This Court's determination that the Tribe's rights were *not* "well-founded" and, in fact, could not be asserted to enlarge its water entitlement at the expense of the Newlands Project farmers, went unheeded by the Ninth Circuit in spite of Petitioner's extensive briefing and argument on that very subject. Instead, in the face of *Nevada v. United States*, the Ninth Circuit upheld the Criteria and enforced the very transfer of water entitlement which this Court had refused to permit. In so doing, the Ninth Circuit stripped the project farmers of the judicial protection which this Court's decision would have provided, had it been given effect. Apparently in the Ninth Circuit the *Orr Ditch* decree did not "end the dispute" between the farmers and the Tribe, did not "settle once and for all the question of how much of the Truckee River each of the litigants was entitled to," nor operate to "hold the Reservation to the claims it made in *Orr Ditch,*" despite this Court's clear holding that it did. *Nevada v. United States, supra,* .... U.S. at ...., 103 S.Ct. at 2925-2926.

The disruptive impact of the decision below is demonstrated by subsequent proceedings in the *Orr Ditch* court, which retains jurisdiction over the administration of the Truckee River water rights it decreed in 1944. When that court recently ordered diversions to Lahontan Reservoir to satisfy the Newlands Project farmers' decreed rights, App. 155, the United States filed a motion, now pending, to set the order aside on the ground that it "violate[s] the sovereign rights of the United States," App. 159, citing the *Tribe v. Morton* court's decree and the trial court's decision in this case. The United States asserts that the *Orr Ditch* court's order "directly conflicts with the order of the District of Columbia Court," App. 158, which, it contends, controls the administration of the river, citing the decisions hereinbelow.

In very real effect, what the Ninth Circuit has accomplished is to reinstate the same decision which this Court

reversed in *Nevada*—the decision that the Tribe may invade the settled rights decreed to the Newlands Project farmers by *Orr Ditch*. For this reason, the Court should accept for review, and then reverse, the decision below.

B. The Ninth Circuit Decision Squarely Conflicts With This Court's Decision in *Hunt v. Washington State Apple Advertising Commission*.

The basis on which the Ninth Circuit managed to avoid ruling on TCID's constitutional challenges to the Criteria was by holding that TCID, having no water rights itself, had no standing to raise such a challenge. That fundamental basis of its decision squarely conflicts with this Court's recent decision in *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333 (1977).

The Ninth Circuit's enforcement of the Operating Criteria is constitutionally defensible only if the court could avoid addressing the collision between the vested rights of the farmers and the Criteria. It contrived to do so by denying TCID's standing to assert or protect the rights of its constituent farmers. App. 6. In so doing, it contravened this Court's holding in *Hunt v. Washington State Apple Advertising Com'n., supra,* and foreclosed that avenue of judicial dispute resolution on which a civilized society depends.

In *Hunt* a Washington state agency, established to promote the state's apple industry, sought to vindicate its member apple producers' constitutional rights to engage in unfettered interstate commerce by challenging a commercial regulation imposed on them by a sister state. The Commission's standing to do so was challenged. In arguments which prefigured the Ninth Circuit's reasoning in this case, the *Hunt* appellants contended that because the Commission was a state agency, not itself engaged in the production and sale of apples, the challenged regulation did not injure the Commission; only its members had the

personal stake in the suit's outcome necessary to confer standing. Moreover, the appellants argued, the Commission could not rely on the injury to its members to confer standing on itself to challenge the regulation.

In its unanimous decision in *Hunt*, this Court rejected those contentions and confirmed the Commission's standing to assert and protect its members' interest. It noted that the Commission,

> admittedly a state agency . . . serves a specialized segment of the State's economic community, which is the primary beneficiary of its activities . . . [Its members] possess all of the indicia of membership in an organization. They alone elect the members of the Commission; they alone may serve on the Commission; they alone finance its activities, including the costs of this lawsuit, through assessments levied upon them.

432 U.S. at 344-45. The Court concluded that:

> In a very real sense, therefore, the Commission represents the State's growers and dealers and provides the means by which they express their collective views and protect their collective interests.

Id. at 345.

TCID's organizational status and the basis for its representation of the Newlands farmers' project water rights in this case are indistinguishable from the Commission's posture in *Hunt*. TCID "exists for the purpose of representing its members and protecting or asserting their common interests." *United States v. Truckee-Carson Irr. District*, 71 F.R.D. 10, 16 (D.Nev. 1975). Its farmers are a specialized segment of the state's economic community, and exclusively comprise, govern and finance TCID, which has, since its formation, served as their representative in negotiations and litigation to vindicate their collective water rights. *See, e.g., Nevada v. United States, supra,*

. . . . U.S. at . . . ., 103 S.Ct. at 2923; *United States v. Alpine Land & Reservoir Co., supra.* Moreover, in the Secretary's dealings concerning the Newlands Project, he is statutorily required to deal with the District rather than with the individual project landowners of which it is composed. 43 U.S.C. § 500. Under such circumstances, it indeed elevates form over substance to deny, as has the Ninth Circuit, TCID's standing to assert and protect its constituents' project water rights. The Ninth Circuit's refusal to accord TCID the standing so clearly conferred by this Court's decision in *Hunt* reduces the farmers' access to judicial process to the level of a shell game played without a pea.[13] Because the decision below so squarely and irreconcilably conflicts with that controlling precedent, it merits review and reversal.

C. The Decision Below Raises Important Issues Concerning The Power Of A Federal District Court To Formulate, Issue, And Enforce Administrative Regulations Over The Objection Of The Executive.

The ruling below is worthy of review not only for its negation of this Court's decision in *Nevada v. United*

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[13] The above metaphor is not overstated; the United States has recently filed a motion in the *Orr Ditch* court contending that the farmers are not entitled to judicial relief even when acting directly on their own behalf. The landowners themselves recently obtained an Order from the *Orr Ditch* court permitting diversions necessary to enforce their rights; the United States has moved to set aside that order, contending that if the farmers, as "beneficiaries of the Project, . . . have a complaint about the federal regulations [limiting diversions] they should take it up with the Secretary of the Interior." App. App. 157, n. 1. At the same time, however, the government freely acknowledges that the Secretary "is under court order not to modify his 1973 regulations," App. 158, and is, in fact, "under orders from the [*Tribe v. Morton*] Court not only to publish regulations but to actively enforce them." App. 159. Were the United States to prevail in its motion, the project rights confirmed by this Court in *Nevada v. United States* would remain purely theoretical until "ratified" by an inferior tribunal, the District of Columbia District Court.

States, but also because the issues which TCID raised in its challenge to the Criteria, so tersely brushed aside by the Ninth Circuit, are themselves important issues of recurring jurisprudential concern and of widespread impact.

TCID also challenged the Criteria on the basis that, in formulating and ordering their enforcement, the *Tribe v. Morton* court acted in excess of its constitutionally delegated powers. As a result of this violation of separation of powers principles, TCID argued, the Criteria were void and ineffective.

For nearly one hundred fifty years this Court has consistently affirmed the principle that the courts have no power to control the exercise of administrative discretion. *Stryker's Bay Neighborhood, Etc. v. Karlen*, 444 U.S. 223, 227 (1980); *Vermont Yankee Nuclear Power v. Nat. Res. Defense Council*, 435 U.S. 1197, 1212 (1978); *F.P.C. v. Transcontinental Gas Pipeline*, 423 U.S. 326 (1976); *N.L.R.B. v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 444 (1965); *United States v. Shaughnessy*, 347 U.S. 260, 266 (1954); *F.P.C. v. Idaho Power Co.*, 344 U.S. 17, 20-21 (1952); *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 88 (1943); *Decatur v. Paulding*, 39 U.S. 497, 516 (1840). As recently as last Term, the United States itself argued to this Court that judicial orders mandating that particular action be taken by an executive officer of the United States are "beyond the competence" of the courts. *See Heckler v. Lopez*, . . U.S. . ., 104 S.Ct. 9 (1984).[14] And even the district court below questioned the "competence

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[14] Because the question of a district court's equitable power to order executive action recurs with some regularity it apparently has yet to be definitely addressed by this Court. *See, e.g., Heckler v. Day*, ... U.S. . . . ., ..., 104 S.Ct. 2249, 2257-58 (1984). The instant case presents an outstanding opportunity for this Court to establish meaningful and well-defined guidelines for the lower courts in reviewing administrative actions.

and authority of the [*Tribe v. Morton*] judge to order termination of TCID's operating contract." App. 31.

There is no question that the challenged Operating Criteria were formulated by the *Tribe v. Morton* court and imposed on the Secretary against his will.[15] The district court so found. App. 30-31. There is no question that enforcement of the Criteria by contract termination was also mandated by the *Tribe v. Morton* court. App. 31. And there is no question that the *Tribe v. Morton* court's order effected a complete and permanent arrogation of rulemaking authority, stripping the Secretary of the power entrusted him by Congress and transferring that power instead to the Tribe and the court. *See* 354 F.Supp. at 262.[16] The only question is whether the judicially devised and mandated Criteria exceed the court's competence and, if so, under what magical rationale they can be transmuted from illegitimate judicial action to legitimate executive action for the violation of which penalties may validly be imposed.

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[15] The Ninth Circuit attempted to convert the coercive court order into an exercise of discretion by holding that the Secretary "chose" not to appeal. Such a characterization conflicts with the uncontradicted evidence and with the district court's express finding. App. 31, 103-105, 106, 108. The authority of the Justice Department to control litigation does not endow it with the power to make administrative decisions entrusted by Congress to a different agency, nor can its decisions clothe the judiciary with executive powers denied it by the Constitution.

[16] The challenged *Tribe v. Morton* Criteria are still in effect, and cannot be changed except with the Tribe's or the court's approval. Upon the Secretary's recent attempt to revise them to reflect the project water entitlements that clearly, consistently, and now, finally, are set forth in the decrees governing both the Truckee and Carson Rivers, the Tribe applied to, and obtained from, the *Tribe v. Morton* court an order setting aside and declaring "null and void" the Secretary's proposed modifications. Thus, the Criteria *still* reduce the farmers' decreed entitlements by one-third, the Secretary is *still* compelled by court order to administer them, and the *Tribe v. Morton* court is *still* aggressively enforcing them.

The Ninth Circuit evaded the question by holding that only the Secretary could assert his right to make the discretionary decisions entrusted by Congress to him. Nevertheless, the force and effect of its decision was to uphold the enforceability of the *Tribe v. Morton* court's order against the Newlands Project farmers and TCID.

In so doing, it not only implicitly sanctioned the exercise of judicial power challenged by TCID, but also created a split of authority between two judicial circuit courts of appeal on this important question. The District of Columbia Circuit Court of Appeals, in a case functionally identical to *Tribe v. Morton,* held that a district court had overstepped the bounds of its judicial authority when it rejected the Postal Service's proposed pay differential schedule and instead formulated and issued its own, which it ordered the Postal Service to implement. *Nat. Ass'n. of Postal Sup'rs. v. U.S. Postal Service*, 602 F.2d 420 (D.C. Cir. 1979). The Ninth Circuit's approval and enforcement of the court-formulated and court-ordered Operating Criteria inherently endorses the same exercise of judicial power condemned by the District of Columbia Circuit Court. This issue is clearly ripe for final resolution by this Court. *See discussion supra* at p. 19, n. 14.

TCID contends that "regulations" designed by a district court and imposed upon the Secretary by court order cannot, by definition, constitute rules promulgated by the administrative officer, or be binding as such. To uphold the enforceability of such an order has the constitutionally impermissible effect of extending the reach of the court's jurisdiction over absent parties, allowing it to exercise indirectly that power which the Constitution forbids it to exercise directly. *See, e.g., United States v. SCRAP,* 412 U.S. 669, 691 (1973); *Arrow Transportation Co. v. Southern R.R. Co.,* 372 U.S. 658 (1963); *Cherokee Nation v. State of Oklahoma,* 461 F.2d 674, 681 (10th Cir. 1972), *cert. denied* 409 U.S. 1039 (1972).

Because the issue and the effects of impermissible judicial arrogation of administrative power are so clearly demonstrated by the instant case, and because the decision below creates a conflict between two judicial circuits on this important question, the Court should accept, review, and reverse the Ninth Circuit's approval and enforcement of the *Tribe* v. *Morton* court's decree.

D. The Decision Below Raises Issues of Widespread Impact Concerning The Scope of Secretarial Rulemaking Power Under The Federal Reclamation Act.

TCID also contended below that even if the Secretary, rather than a court, had formulated and adopted the Operating Criteria at issue in this case, they would have been void because (1) they exceed the express limits of the Reclamation Act on Secretarial power, and (2) they neither were designed to nor did further or promote the goals of the Reclamation Act.

This Court has repeatedly held that the water rights appurtenant to project lands are beneficially owned by the project landowners, are acquired by the project farmers' application of water to beneficial use pursuant to state law, and are governed by state law. *See, e.g., Nevada v. United States*, . . U.S. . ., . ., 103 S.Ct. 2906, 2914-2916 (1983); *California v. United States*, 438 U.S. 645, 664 (1978); *Nebraska v. Wyoming*, 325 U.S. 589, 613-614 (1945); *Ickes v. Fox*, 300 U.S. 82, 94-96 (1937).

The Court has also consistently held that the Government's interest in the water rights of reclamation project lands is purely financial; it is that of a lien-holder seeking to secure repayment of the cost of project construction and of its operation and maintenance. *See, e.g., id.* And the Court has made clear that, in light of the farmers' beneficial ownership of project water rights and the limited financial nature of the United States' interest therein, the government is not free to deal with them as it

might see fit, without restraint. *Nevada v. United States, supra.* Rather, the provision of Section 8 of the Reclamation Act mandating a beneficial use standard is a "specific congressional directive" which acts as a "restraint upon the Secretary." *California v. United States,* 438 U.S. 645, 678, n.31 (1978).

At least two cases have applied this "restraint" to invalidate previous attempts by Secretarial rulemaking to limit project water entitlements to less than the amount needed for beneficial use. *Fox v. Ickes,* 137 F.2d 30 (D.C.Cir.), *cert. denied* 320 U.S. 792 (1943); *Lawrence v. Southard,* 192 Wash. 287, 73 P.2d 722 (1937) (terming such a rule "a nullity"). Even the Ninth Circuit Court of Appeals has held that, in light of the limitation of Section 8 of the Reclamation Act, water contracts entered into by the Secretary cannot be enforced by the courts if they provide a "different water duty than a beneficial use inquiry would indicate." *Alpine,* 697 F.2d at 885.[17]

Beyond this express statutory restraint, moreover, is the restraint imposed by this Court's enunciation of the standards by which the legitimacy of administrative rules must be judged. The standard against which an administrative regulation is measured to determine whether it exceeds statutory authority has often been restated by this Court and is well-settled: it must be "reasonably related to the purposes of the enabling legislation" and

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[17] A determination of the amount of water necessary for beneficial use is a factual determination which varies according to soil type, crops, precipitation, conveyance losses and climate. *United States v. Alpine Land & Reservoir Co., supra,* 697 F.2d at 854-55. As the Ninth Circuit recognized, "It is not a hard and fast unit of measurement, but is variable according to conditions." *Id.*, quoting *Farmers Highline Canal & Reservoir Co. v. City of Golden,* 129 Colo. 575, 584-85, 272 P.2d 629, 634 (1954). As such it is not amenable to control by rulemaking, the hallmark of which is determination of general policy, rather than individualized facts; it must instead be determined through adjudication.

promote achievement of the legislative goals. *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 370 (1973). *See also United States v. Larionoff*, 431 U.S. 864 (1977); *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 280-81, (1969), 386 U.S. 670 (1969); *American Trucking Assn. v. United States*, 344 U.S. 298 (1953); *Manhattan General Equip. Corp. v. Comm'r. Int. Rev.*, 297 U.S. 129 (1936).

The objective of the Reclamation Act, 43 U.S.C. §§ 372, *et seq.*, was to provide funding for large scale irrigation projects, *California v. United States*, 438 U.S. 645, 648 (1978), and to promote settlement of the largely unpopulated arid West. *Id.* at 658. In other words, the purpose of the statutory scheme was the settlement and irrigation of the arid lands in the West to make them productive.

Judged by this standard, the Operating Criteria are wholly unauthorized and beyond the scope of the Secretary's authority to adopt as regulations. Neither their purpose, their effect, nor their rationale bear any relationship whatever to the legislative goals of irrigation and settlement. To the contrary, the Criteria detract from those objectives since they operate to deny needed irrigation water to reclamation lands rather than to furnish it. That this is so is neither surprising nor accidental, for the Criteria were designed for the avowedly contrary goal of protecting and enhancing the asserted rights of *non-reclamation* lands and users, Pyramid Lake and the Pyramid Lake Paiute Tribe of Indians, in derogation of the adjudicated rights of the reclamation project lands and users.

In spite of the manifest antagonism between the Operating Criteria and the goals and purposes of the Reclamation Act, both courts below refused to hold unauthorized a purported regulation which indisputably reduces Newlands project landowners' vested water rights from the amount previously found necessary for beneficial use,

Alpine, supra, 503 F.Supp. 877, 888 (D.Nev. 1983); *aff'd* 697 F.2d 851, 856-857 (9th Cir. 1983), to a level which even the Ninth Circuit has observed, "would drastically reduce the farmers' yields over the long term." 697 F.2d at 856-857.

The district court in this case held:

> The only limit on the Secretary's ability to regulate the water supply is an upper limit. Here, the Secretary issued a regulation reducing the amount of water to be diverted. Consequently, the reduction was within the Secretary's authority.

App. 24.

The Ninth Circuit affirmed, stating:

> The Secretary did not exceed his authority when he adopted the operating criteria. In the 1926 contract, the Secretary explicitly reserved the right to issue rules and regulations governing the operation of the Newlands Project. This reservation allowed the Secretary to issue the regulation restricting the amount of water that would be diverted.

App. 9.

Ironically, even the *Tribe v. Morton* court acknowledged that "neither the Secretary nor this Court can adopt or require a regulation that would infringe upon [the *Orr Ditch* and *Alpine*] decrees." 354 F.Supp. at 257. Yet that infringement is the now-undeniable effect of the Criteria which the courts below nonetheless upheld. *See* discussion *supra*, p.6 n.9.

The scope of Secretarial rulemaking authority under the Reclamation Act is of extraordinary importance to tens of thousands of farmers on numerous federal reclamation projects throughout the seventeen Western States, and to the agriculture-based economies of those states. Reclamation projects furnish irrigation water to

11.4 million acres of land which in 1978 alone produced nearly five billion dollars' worth of crops. *Water and Power Resources Service: Project Data,* V (GPO 1981). Water is a scarce resource in the arid West; its availability in sufficient quantity spells the difference between valuable, productive agricultural land and worthless desert. Thus, the Ninth Circuit's holding that the Secretary of the Interior, without notice or hearing, may make binding reductions of the amount of water to which these project farmers' vested rights entitle them, has a potentially devastating impact on thousands of farmers, farm families and farming communities throughout the Western United States.

If the Ninth Circuit's decision is left intact, it is not improbable that the Secretary will increasingly be faced with demands and lawsuits seeking to require him to "comply with the mandate of Section 8 of the Reclamation Act" and adopt rules limiting water use on other reclamation projects. And, as in the *Tribe v. Morton* case, lawsuits challenging such rules as he may adopt, or challenging his failure to adopt such rules, may be brought in the District of Columbia, half a continent distant from the land and the water affected. The inconvenience and expense occasioned by the distance could place formidable obstacles to effective participation by reclamation farmers in any such action, a difficulty which is exacerbated if, as the courts below have held, the farmers' irrigation district has no standing to assert and protect their interests on their behalf. Thus, the rulemaking authority approved by the Ninth Circuit in this action could easily, as it has here, operate to effectively divest reclamation landowners and farmers of their essential vested water entitlements without any meaningful opportunity to be heard on the matter.

Such a holding so vividly contrasts with this Court's consistent and repeated recognition of the protected nature of the reclamation farmer's interest in his water rights that it merits review and reversal.

E. The Ninth Circuit's Conclusory Denial Of Due Process Protection To TCID's Contractual and Decreed Rights Merits Reversal.

The Ninth Circuit's decision also merits reversal because of its conclusory and erroneous rejection of TCID's own substantive rights under the Truckee River Agreement, the *Orr Ditch* decree, and the 1926 operating contract.

The Truckee River Agreement provided TCID with "the right to the use of thirty-one (31) percent of the diverted flow" "upon the Carson and Truckee Divisions of the Newlands Reclamation Project." App. 86. It further plainly provided, however,

> that at any time when the right [of other upstream diverters] to use any portion of the sixty-nine (69) percent of the diverted flow is not being fully exercised . . . and by reason of such fact there shall exist a flow of water available for diversion at [the Project's] Derby Dam in excess of the amount to which the [Truckee-Carson] Irrigation District is entitled at such time under the provisions of the Truckee River [*Orr Ditch*] Final Decree and/or this agreement, *the Irrigation District shall have the right to divert and use such excess for its own purposes.* (Emphasis added.)

App. 86.

The Truckee River Agreement was signed by the United States. It was also expressly adopted by the *Orr Ditch* court as a controlling part of the *Orr Ditch* final decree. Its plain language confers upon TCID proprietary rights of its own, to be used for its own purposes, separate from

the project rights beneficially owned by the project farmers. Because of the severe limits imposed on diversions of Truckee River flows into the Truckee Canal, the Criteria not only drastically infringe the project farmers' water rights, they completely eliminate TCID's right and ability to divert, for its own purposes, the water to which the *Orr Ditch* decree and the Truckee River Agreement entitle it.

TCID also has constitutionally protected rights in its 1926 operating contract which prevent its arbitrary termination. *See Lynch v. United States*, 292 U.S. 571, 579 (1934); *See also Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 279, n.33 (1969).

While the Ninth Circuit's holding eradicating these rights is not of as momentous or national proportion as its errors presented elsewhere in this petition, nevertheless its error is so plain and fundamental to its holding in the case that it deserves correction by this Court.

CONCLUSION

The dispute below raises serious questions concerning the power of the courts over coequal branches of the federal government and over the rights of persons not before them. It also raises questions concerning the authority of the Secretary of the Interior over essential rights of landowners on reclamation projects throughout the United States. Moreover, it reverses the effect of this Court's recent decision in *Nevada v. United States* governing the same basic dispute as that presented in the instant case, and does so on the basis of a standing determination which, itself, squarely conflicts with another of this Court's decisions, *Hunt v. Washington State Apple Advertising Com'n.* The Ninth Circuit Court of Appeals' decision is unadorned by either analysis or citation of authority. Particularly because its erroneous conclusions enabled it to avoid addressing the significant issues presented in TCID's challenge to the Operating Criteria, the decision of the court below merits consideration and reversal.

Respectfully submitted,

KRONICK, MOSKOVITZ,
TIEDEMANN & GIRARD
A PROFESSIONAL CORPORATION
*FREDERICK G. GIRARD
JANET K. GOLDSMITH
ROBIN L. STEWART
ANDREA M. MILLER
COUNSEL OF RECORD*

Attorneys for Truckee-Carson Irrigation District

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No.

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CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner,

VS.

SECRETARY, DEPARTMENT OF THE INTERIOR,
Respondent,

VS.

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Respondent-Intervenor.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KRONICK, MOSKOVITZ,
TIEDEMANN & GIRARD
A Professional Corporation
*FREDERICK G. GIRARD
JANET K. GOLDSMITH
ROBIN L. STEWART
ANDREA M. MILLER
COUNSEL OF RECORD*
770 L Street, Suite 1200
Sacramento, CA 95814
Telephone (916) 444-8920
Attorneys for Truckee-Carson Irrigation District

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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Appendix A: Opinion, Ninth Circuit Court of Appeals, Truckee-Carson Irrigation District v. Secretary of Department of Interior, No. 83-2351, Filed September 10, 1984.

United States Court Of Appeals

For The Ninth Circuit

No. 83-2351
DC # CV 74-34 BRT

Truckee-Carson Irrigation District,
Plaintiff-Appellant,

vs.

Secretary of Department of Interior,
Defendant-Appellee,

and

Pyramid Lake Paiute Tribe of Indians,
Defendant-Intervenor-Appellee.

[Filed Sept. 10, 1984]

OPINION

Appeal from the United States District Court
for the District of Nevada
Bruce R. Thompson, District Judge, Presiding
Argued and Submitted April 10, 1984

Before: SNEED and FLETCHER, Circuit Judges, and BURNS*, District Judge.

For Publication

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*Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

SNEED, Circuit Judge:

This case is another chapter in the long story about the legal relationships pertaining to the waters of the Truckee River. Truckee-Carson Irrigation District (TCID) in this case seeks an injunction prohibiting the Secretary of the Interior (Secretary) from terminating TCID's contract to operate the Newlands Reclamation Project. The Secretary terminated the contract due to TCID's violation of operating criteria related to the Project. TCID's suit also sought a declaration that the operating criteria are invalid. The district court held for the Secretary and TCID appealed. We affirm.

I.

BACKGROUND

In its natural state, the Truckee River flowed into Pyramid Lake, which, like most Nevada lakes, has no outlet. Early in this century, however, the United States built the Newlands Reclamation Project under the Reclamation Act of 1902. This project diverts water from the Truckee River into the Truckee Canal at Derby Dam. The diverted water flows through the Truckee Canal into Lahontan Reservoir, where it is merged with water from the Carson River. Of course, any water that is diverted into Lahontan Reservoir does not enter Pyramid Lake. Water from Lahontan Reservoir is used to irrigate the farms in the TCID.

Pyramid Lake is located on the Pyramid Lake Indian Reservation, which is inhabited by the Pyramid Lake Paiute Tribe (Tribe). Drainage from the Truckee River into Lahontan Reservoir has significantly reduced the size of Pyramid Lake. This reduction in size has endangered the fish that inhabit the lake. Because the Tribe relies on the lake's fishery for at least a portion of its livelihood, it is interested in having as much water as

possible enter Pyramid Lake. Of course, any water that enters Pyramid Lake does not enter Lahontan Reservoir and is not available to irrigate farms in the TCID. Thus, the interests of the Tribe directly conflict with the interests of TCID and the farmers who rely on Lahontan Reservoir water.

Before the Newlands Project was built, several private landowners had established rights to Truckee River water. In 1913, the federal government sued on behalf of both the project and the Pyramid Lake Reservation in order to establish their rights to Truckee River water for irrigation purposes. (TCID did not exist at that time.) *See Nevada v. United States,* 103 S. Ct. 2906, 2911 (1983). This suit became known as the *Orr Ditch* litigation. In 1926, the district court entered a temporary restraining order that outlined the *Orr Ditch* parties' water rights on an experimental basis.

Later in 1926, the Secretary and the newly founded TCID entered into a contract that gave TCID operational control of the Newlands Project. Paragraph 34 of the contract permitted the Secretary to enact reasonable rules and regulations to carry out the contract. Furthermore, paragraph 32 authorized the Secretary to terminate the contract for any breach of the contract or the regulations adopted under it.

In 1934, a severe drought stimulated interest in settling the *Orr Ditch* litigation and ending the 1926 temporary restraining order. 103 S.Ct. at 2912. At that time, TCID (rather than the federal government) represented the interests of the Newlands Project. In 1935, the Truckee River water users (i.e., the parties to the *Orr Ditch* litigation) reached a settlement referred to as the Truckee River Agreement. In 1944, the district court issued a final decree that ended the *Orr Ditch* litigation. *United States v. Adams (Orr Ditch),* Equity Docket No.

A3 (D.Nev. Sept. 8, 1944). This *"Orr Ditch* Decree" specifically incorporated the Truckee River Agreement as a portion of its holding. *Id.* at 86, 88.

The Tribe became increasingly dissatisfied with the amount of water being delivered to Pyramid Lake. In a 1970 D.C. District Court suit, in which TCID was not a party, the Tribe claimed that the Secretary's Newlands Project regulations allowed TCID to divert more than its legally recognized share of the water to the project and that water was being wasted because the regulations permitted inefficient operation. *See Pyramid Lake Paiute Tribe of Indians v. Morton (Tribe v. Morton)*, 354 F. Supp. 252 (D.D.C. 1972 & 1973). The D.C. District Court found that the Secretary's regulations were improper, in part because they permitted TCID to divert too much Truckee River water. The court instructed the Secretary to propose regulations that would either insure that 385,000 acre feet of water per year would enter Pyramid Lake or be accompanied with a detailed explanation of why this level could not be reached. *Id.* at 258. The court rejected the regulations submitted by the Secretary, however, and directed the Tribe to enter proposed regulations. The court ultimately adopted a modified version of the Tribe's proposed regulations and ordered the Secretary to publish these regulations in the Federal Register. *See* 354 F. Supp. at 260-266. These regulations (or "operating criteria") allow TCID to divert a maximum of 350,000 acre feet of water for the first water year they were in effect and maximum of 288,129 acre feet per year thereafter. *Id.* at 261. The regulations also contain several provisions designed to promote efficiency. In addition, section D(1) of the regulations apparently requires the Secretary to terminate the 1926 contract giving operational control of the project to TCID if TCID engages in a substantial violation of the regulations. *Id.* at 265.

In June of 1973, during the first year the new regulations were in effect, TCID intentionally violated them by diverting more water than the regulations permitted.[1] The Secretary notified TCID that, as a result of TCID's violation of the operating criteria, he intended to terminate the contract and resume control over the project. TCID filed the instant suit to prevent the Secretary from terminating the contract and to have the 1973 operating criteria declared invalid. In 1983, the district court denied recovery. TCID filed this appeal.

On appeal, TCID claims that it owns a right to a portion of the Truckee River's water and that this right was taken from it without due process of law by *Tribe v. Morton,* the operating criteria accepted by the Secretary as a result of the *Tribe v. Morton* litigation, and the district court's decision in the instant suit. We reject those contentions. We find, first, that TCID does not own any right to a portion of the Truckee's water, but, rather, merely had the right to manage the Newlands Project. Second, we find that the *Tribe v. Morton* decision did not interfere with TCID's right to manage the project. Finally, we affirm the district court's holding that the Secretary properly terminated the contract when TCID violated the operating criteria.

II.

THE NATURE OF TCID'S RIGHTS

Under the terms of the 1926 contract between TCID and the Secretary, TCID had the right to manage the

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[1] TCID admits that it diverted more water than the operating criteria permitted. TCID may have violated other provisions in the operating criteria, but it does not admit any other violations. Because we find that TCID's violation of the operating criteria's diversion limitation authorized the Secretary to terminate the contract, we do not reach the issue of whether TCID violated other provisions of the operating criteria.

Newlands Project. If this right to manage the Project was taken from TCID in the *Tribe v. Morton* suit, TCID's property, this right to manage, may well have been taken without due process of law because, as already pointed out, TCID was not a party to the *Tribe v. Morton* suit. But this would not be true if this right to manage was unaffected by *Tribe v. Morton*. Thus, the critical question in the instant suit is whether TCID's right to manage the Newlands Project has been interfered with by *Tribe v. Morton*.

A. *Absence of Water Rights.*

As a water district responsible for managing a reclamation project, TCID does not directly own any water rights. Rather, the landowners within the service area irrigated by the Newlands Project own water rights. The *Tribe v. Morton* court stated that it was not interfering with these water rights.[2] Even if that court did interfere with these water rights, TCID has no Fifth Amendment claim based on this interference because it would not have lost any property as a result of this interference. Only those who would have lost property, the owners of land with water rights, could claim a deprivation of property without due process.

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[2] The *Tribe v. Morton* court explicitly stated that the operating criteria implemented by the Secretary must give proper weight to the water rights outlined in the *Orr Ditch* and *Alpine* decrees. 354 F. Supp. at 260. (The *Alpine* litigation was an adjudication of the water rights on the Carson River, just as the *Orr Ditch* litigation was an adjudication of the water rights on the Truckee River. An interim restraining order entered in 1952 controlled the *Alpine* dispute until 1980. In 1980, the district court entered a final disposition of this suit. *United States v. Alpine Land & Reservoir Co.*, 503 F. Supp. 877 (D. Nev. 1980). The Ninth Circuit essentially affirmed this disposition. *See United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851 (9th Cir.), *cert. denied*, 104 S.Ct. 193 (1983).

In an attempt to demonstrate that it owns water rights, in addition to its right to manage the Newlands Project, TCID asserts that the Truckee River Agreement gives it a water right to a portion of the diverted flow of the Truckee River. We disagree. The assertion rests on a misinterpretation of the Truckee River Agreement. It is true that the Truckee River Agreement, which was incorporated into the *Orr Ditch* decree, gave TCID the right to dispose of a portion of the diverted flow of the Truckee River that reached Derby Dam. It did not give TCID any property rights in the flow, however. TCID's rights were strictly managerial. It had no right to the water itself. Thus, the reduction in the amount of water that could be diverted as required by the *Tribe v. Morton* decision and the operating criteria took no property from TCID.

B. *Management Rights.*

Nor was TCID's right to manage the Newlands Project interfered with by *Tribe v. Morton.* TCID's right to manage the Newlands Project was never unrestricted. The 1926 contract, for example, explicitly stated that the Secretary had the authority to adopt regulations concerning the operation of the project and that he could terminate the contract if the regulations were violated. Thus, TCID's contractual right to operate the project was taken from it only if *Tribe v. Morton* or the operating criteria further diminished its right. That did not happen. TCID's rights, both before and after *Tribe v. Morton,* were limited to those of managing the project as long as the Secretary's regulations were followed.

The *Tribe v. Morton* decision, of course, reduced the amount of water TCID was authorized to divert. But TCID had no water rights. Only the nature of its managerial duty was affected. This does not amount to a taking of property without due process.

TCID also asserts that the *Tribe v. Morton* court improperly forced the Secretary to adopt the operating criteria without allowing him to exercise his administrative discretion. By this argument TCID is once again asserting that it was harmed because rights belonging to others were infringed. The Secretary was the proper party to assert that the operating criteria were improperly forced upon him by the *Tribe v. Morton* court. The Secretary had the opportunity to make these arguments in the *Tribe v. Morton* litigation. Moreover, he chose not to appeal the *Tribe v. Morton* decision. Thus, he lost the opportunity to make these assertions. As a result, the operating criteria are now the regulations of the Secretary. The Secretary is enforcing them as his own in the instant suit. TCID may not like them; however, their imposition violates no Fifth Amendment right of TCID.

III.

THE DISTRICT COURT DECISION ON TERMINATION OF THE CONTRACT

The district court held that this suit was within its jurisdiction, that the adoption of the operating criteria (including the reduction in total diversions) was within the Secretary's authority, and that the Secretary's termination of the contract did not deprive TCID of its constitutional rights. We agree with each of these conclusions.

A. *Jurisdiction.*

Because TCID claims that the operating criteria and the Secretary's termination of the contract deprived it of property in violation of the Fifth Amendment to the Constitution, this suit is within the district court's federal question jurisdiction. *See* 28 U.S.C. § 1331. Sovereign immunity is not a bar to this suit because 5 U.S.C. § 702

waives sovereign immunity for suits against federal agencies and agents where relief other than monetary damages is sought. Thus, the district court properly reached the merits of the dispute.

B. *Authority To Adopt Operating Criteria.*

The Secretary did not exceed his authority when he adopted the operating criteria. In the 1926 contract, the Secretary explicitly reserved the right to issue regulations governing the operation of the Newlands Project. This reservation allowed the Secretary to issue the regulation restricting the amount of water that would be diverted. Similarly, even if the operating criteria were more restrictive than similar conditions under the 1926 contract, this change was within the Secretary's authority.

The Secretary's promulgation of the operating criteria was neither arbitrary nor capricious. *See* 5 U.S.C. § 706(2)(A). The criteria were adopted under the direction of the *Tribe v. Morton* court after the court and the Secretary considered the Secretary's obligations to TCID, to the water rights owners, and to the Tribe. *See* 364 F. Supp. at 255. After "consider[ing] whether the [promulgation of the operating criteria] was based on a consideration of the relevant factors and whether there has been a clear error of judgment," as required by *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), we cannot say that the promulgation of the operating criteria was arbitrary or capricious.

C. *Termination of the Contract.*

Finally, the Secretary's termination of the contract following TCID's violation of the operating criteria did not deprive TCID of property without due process of law.

TCID readily admits that it violated the operating criteria by diverting more water than the criteria permitted. The 1926 contract explicitly gave the Secretary the right to terminate the contract if TCID violated regulations concerning the operation of the Newlands Project. It did, and the Secretary exercised his right to terminate. That was the agreement and we see no reason why TCID should not be required to abide by it.

AFFIRMED.

Appendix B: Memorandum Opinion, District Court for the District of Nevada, Truckee-Carson Irrigation District v. Secretary of the Department of the Interior, Civil R-74-34-BRT, Filed August 17, 1983.

In the United States District Court
For the District of Nevada

Civil R-74-34 BRT

Truckee-Carson Irrigation District,
Plaintiff,

vs.

Secretary of the Department
of the Interior,
Defendant,

vs.

Pyramid Lake Paiute Tribe of Indians,
Defendant-Intervenor.

[Filed Aug. 17, 1983]

MEMORANDUM OPINION

This is an action by the Truckee-Carson Irrigation District to prevent the Secretary of the Interior from terminating TCID's contract to operate the Newlands Irrigation Project. The Secretary's termination of the contract was based on numerous violations of criteria issued by the Secretary concerning operation of the project. TCID seeks a declaration that these criteria are void and an injunction prohibiting termination of the contract. The Government and the Intervenor, Paiute Tribe, pray for a declaration that the Secretary of Interior has legally

terminated the contract dated December 18, 1926, and has a lawful right to possession and control of the Newlands Reclamation Project effective as of November 1, 1974.

Final decision of this case has been deliberately delayed by this Court because of the pendency of companion litigation to which the TCID was an indispensable party as the convenient representative of a large class of interested parties, namely, the owners of water rights under the Newlands Irrigation Project. Although other litigation is still pending, the two most important lawsuits have been decided: *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851 (9th Cir. 1983) (the adjudication of use of the waters of the Carson River), and *Nevada v. United States* ____ U.S. ____, 51 L.W. 4974, June 24, 1983 (the adjudication of use of the waters of the Truckee River).

On December 18, 1926, the Secretary of the Interior (Secretary) and the Truckee-Carson Irrigation District (TCID) signed a contract which transferred the care, operation and maintenance of the Newlands Reclamation Project to TCID. Under this contract the Secretary retained the authority to issue rules and regulations concerning the operation of the project. Pursuant to this authority the Secretary has issued criteria regulating TCID's operation of the the project since 1967.

In September 1972, the Secretary issued operating criteria for the period from November 1, 1972 through October 31, 1973. These operating criteria were challenged by the Pyramid Lake Paiute Tribe in *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252 (D.D.C. 1972). The Tribe contended that the operating criteria allowed more water to be delivered to the project than required by applicable court decrees and statutes and, thus, diverted water that otherwise would flow into

Pyramid Lake. The Court reviewed the Secretary's regulations and found them to be unsupported by the administrative record. Consequently, the Court directed the Secretary to submit proposed amended regulations. The Court's final judgment and order included amended operating criteria which were to govern operation of the project for the remainder of the 1972-73 water year and the water year beginning November 1, 1973.

The approved operating criteria were mailed to TCID on March 7, 1973, and were published in the Federal Register on March 12, 1973. TCID admits, however, that these criteria were never implemented. Paragraph XVIII of the complaint reads, in part:

> Truckee-Carson Irrigation District has refused and continues to refuse to comply with the so-called Operating Criteria and Procedures for the Newlands Reclamation Project as published in the Federal Register by the Acting Secretary of Interior on or about March 12, 1973.

This refusal to comply with the operating criteria was substantiated by evidence produced at trial.

Richard Lattin, a member of the Board of Directors of TCID, appeared on behalf of TCID and testified to numerous violations of the operating criteria. The following were among the violations Lattin testified to: (1) TCID delivered water to non-water right lands; (2) TCID allowed individuals who were not TCID employees to operate turnouts; (3) TCID did not develop a system to measure the amount of water delivered to customers; (4) TCID did not establish a system to charge for water actually delivered; and (5) TCID diverted more water from the Truckee River than authorized.

The administrative record before the Court also evidences TCID's refusal to comply with the operating

procedures. The record shows that diversion of water from the Truckee River exceeded the amount authorized for the months of April, May, June, July, and August of 1972. After each of these violations TCID was given notice of the excessive diversion. TCID made no effort to reduce the diversion of water and comply with the operating criteria.

In addition to the excessive diversion of water, the record also evidences other violations of the operating criteria. The following violations were identified in a report on TCID's compliance dated May 22, 1973: (1) TCID delivered water to non-water rights lands; (2) TCID allowed individuals who were not TCID employees to operate turnouts; (3) TCID failed to develop a plan for measurement of water flows; and (5) TCID failed to submit a monthly report. This compliance report was sent to TCID, yet TCID made no effort to bring itself into compliance. Consequently, a second compliance report dated August 8, 1973, identified the same violations as the May 22nd report.

Confronted with TCID's continued violation of the operating criteria, the Secretary chose to terminate the 1926 contract. By letter dated September 14, 1973, the Secretary notified TCID that the contract would be terminated on October 31, 1974. TCID filed the present action on March 18, 1974, to enjoin the termination of the contract.

There are four general issues raised by the parties. The issue which must be addressed first is the Secretary's challenge to this Court's jurisdiction based on the doctrine of sovereign immunity. The second general area of issues centers around TCID's claim that the operating criteria are invalid. TCID argues that the operating criteria are invalid because (a) the criteria were not issued in

accordance with the procedure prescribed by the Administrative Procedures Act; (b) the criteria were in excess of the Secretary's authority; and (c) the criteria were arbitrary and capricious. The third general issue concerns TCID's challenge to the enforceability of the operating criteria. TCID argues that the criteria cannot be enforced because (a) TCID was not a party in *Tribe v. Morton*, the case in which the criteria were formulated; (b) the criteria unconstitutionally impair the 1926 contract, and (c) the Secretary did not comply with the requirements of the National Environmental Policy Act. The fourth issue concerns TCID's noncompliance with the operating criteria and whether this noncompliance constitutes a breach of the 1926 contract.

I

SUBJECT MATTER JURISDICTION

Defendants have repeatedly asserted that this Court lacks subject matter jurisdiction to hear this case because of the doctrine of sovereign immunity.[1] It is firmly established that "the United States, as sovereign, is immune

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[1] There is no question that the defendants have raised the issue of sovereign immunity in their attack on this court's jurisdiction. It is not so clear, however, whether they are also contending that plaintiff's claim can only be brought in the Court of Claims because it is primarily a contract action against the United States involving a claim in excess of $10,000 which under the Tucker Act, 28 U.S.C. § 1491, lies within the exclusive jurisdiction of the Court of Claims. This argument is suggested at page 32 of defendants' post-trial brief.

Assuming that defendants have made this argument, the Tucker Act does not require that this case be brought in the Court of Claims. The Tucker Act applies only to claims for money damages. It is generally recognized that the Court of Claims' jurisdiction cannot be avoided by a complaint that appears to seek only equitable relief when the "real effort of the complaining party is to obtain money [in excess of $10,000] from the federal government" *Rowe v. United States*, 633 F.2d 799 (9th Cir. 1980), quoting from *Bakersfield City School*

from suit save as it consents to be sued, and the terms of consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood,* 312 U.S. 584, 586, 61 S.Ct. 767, 769, 85 L.Ed. 1056 (1941). *See also United States v. Testan,* 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). "Unless sovereign immunity has been waived or does not apply, it bars equitable as well as legal remedies against the United States." *Beller v. Middendorf,* 632 F.2d 788, 796 (9th Cir. 1980), *cert. denied,* ____ U.S. ____, 101 S.Ct. 3030 (1981). Although the boundaries of this doctrine are in a constant state of flux, their present demarcation in the Ninth Circuit indicates that sovereign immunity is not a bar to this action.

Paragraph II of the complaint sets forth two grounds upon which plaintiff predicates federal court jurisdiction in this action. It reads as follows:

> The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1331(a), as the amount in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and arises under the laws of the United States, as hereinafter more fully appears. The jurisdiction of this court is also invoked pursuant to the provisions of 5 U.S.C. 701-706, inclusive, in that plaintiff Truckee-Carson

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District v. Boyer, 610 F.2d 621, 628 (9th Cir. 1979). In the instant case, plaintiff has made no effort to seek monetary damages either expressly or impliedly. Its sole request is for declaratory and injunctive relief. If plaintiff's request should be granted, the outcome will not result in the equivalent of money damages. Therefore, it cannot be said that plaintiff's "real effort" is to obtain money from the federal government which would require this court to decline jurisdiction to hear the case. Finally, it should be noted that a district court does not lose jurisdiction over a claim for non-monetary relief simply because the claim may later be the basis for a money judgment. *Laguna Hermosa Corp. v. Martin,* 643 F.2d 1376, 1379 (9th Cir. 1981).

> Irrigation District is suffering legal wrong because of agency action, or is adversely affected or aggrieved by agency action within the meaning of a relevant statute. This action is properly brought in this court against the defendant Secretary of Interior pursuant to 28 U.S.C. 1391(e).

The allegations in the complaint generally set forth the following federal questions under 28 U.S.C. § 1331: Plaintiff has generally alleged (1) that the 1973 operating criteria were promulgated in a manner contrary to the National Environmental Policy Act of 1969 and the procedural due process protections of the Fifth Amendment; (2) that the substance of the operating criteria violates Fifth Amendment guarantees; and (3) that the Secretary's termination of the 1926 contract pursuant to the constitutionally void operating criteria was illegal. Plaintiff's claims, therefore, fall within statutory "federal question" jurisdiction because they involve rights created by the Constitution and laws of the United States which are an essential element to the existence of each claim. In short, plaintiff challenges rules and regulations promulgated by the Secretary, and action taken pursuant thereto, which allegedly cannot be justified under the Constitution or laws of the United States.

According to paragraph II, plaintiff has also asserted jurisdiction under the provisions of the Administrative Procedures Act (APA), 5 U.S.C. § 701, et seq. At the time this action was commenced, many courts thought that the APA, in and of itself, afforded an implied grant of subject matter jurisdiction for review of agency action. K.C. Davis, *Administrative Law Treatise,* § 23.02 (1st ed., Supp. 1982). The decision in *Califano v. Sanders,* 430 U.S. 99, 105, 61 L.Ed.2d 192, 97 S.Ct. 980 (1977), however, established that the APA is not an independent jurisdictional predicate. It is now considered sufficient to

rest an action for agency review upon federal question jurisdiction. *Chrysler Corp. v. Brown,* 441 U.S. 281, 317 n. 47 (1979); *Andrus v. Charlestone Stone Products Co.,* 436 U.S. 604, 607 n. 6 (1978); *Glacier Park Foundation v. Watt,* 663 F.2d 882, 885-86 (9th Cir. 1981); *McCartin v. Norton,*____F.2d____, decided April 22, 1982, Adv. Sh. 1659 (9th Cir. 1982). Jurisdiction of the present case rests solely upon 28 U.S.C. § 1331.

Although the APA provisions have lost their force as an independent jurisdictional predicate, they have taken on new significance in the area of sovereign immunity. In 1976, Congress amended Section 702 of the Administrative Procedures Act to waive sovereign immunity in suits seeking judicial review of agency action, where the relief sought is other than money damages. 90 Stat. 2721 (1976). Section 702, as amended, now provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the

> court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Unfortunately, the parties to this action have for the most part overlooked the impact that amended Section 702 has had on the doctrine of sovereign immunity. In addressing the issue of sovereign immunity, the parties have revived pre-1976 sovereign immunity case law, principally, *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 93 L.Ed.2d 1628, 69 S.Ct. 1457 (1949), and its progeny, to resolve this jurisdictional issue. In light of the recent trend in the circuit courts to apply the waiver of sovereign immunity contained in Section 702 to "non-statutory"[2] review actions brought under Section 1331, it is unnecessary to decide whether pre-1976 sovereign immunity law provides an alternate ground, independent of 5 U.S.C. § 702, for finding sovereign immunity inapplicable to plaintiff's claim for equitable relief. This decision to apply 5 U.S.C. § 702 to the present case rests primarily upon the following cases: *Rowe v. United States*, 633 F.2d 799 (9th Cir. 1980), *cert. denied*, 101 S.Ct. 2047 (1981); *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980); *Sheehan v. Army and Air Force Exchange Service*, 619 F.2d 1132 (5th Cir. 1980); *Jaffe v. United States*, 592 F.2d 712 (3rd Cir.), *cert. denied*, 441 U.S. 961 (1979).

Thus, the waiver of sovereign immunity found in the APA applies to this case if the requirements of Section 702 are satisfied. Under Section 702 the lawsuit must seek relief other than money damages and state a claim that an agency or an officer or employee thereof acted or

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[2] For a thorough analysis of this trend, see K. Kavis, *Administrative Law Treatise*, Chap. 27 (1st ed., Supp. 1982).

failed to act in an official capacity or under color of legal authority. It is clear that these requirements are met in the instant case. Plaintiff's claims seek declaratory relief from actions of the Secretary of Interior which were allegedly taken pursuant to constitutionally void rules and regulations.

II

VALIDITY OF THE OPERATING CRITERIA

A. Promulgation of the Amended Operating Criteria.

The operating criteria challenged in the present case were formulated and approved by the court in *Tribe v. Morton*. The Secretary published the operating criteria in the Federal Register in accordance with the court order. TCID contends that this method of promulgation violated the requirements of the Administrative Procedures Act (APA).

The APA provides the procedural standard which must be followed before an agency may take any action. Under the APA the agency is required to follow different procedures depending on whether the agency action was an adjudication or rulemaking. Thus, to determine if the proper procedure was followed, we must first determine whether the Secretary's issuance of the operating criteria involved an adjudication or rulemaking.

The distinction between adjudication and rulemaking is found in 5 U.S.C. § 551. "Adjudication" is defined in § 551(7) as "agency process for the formulation of an order." An "order" means "the whole or part of a final disposition . . . in a matter *other than rulemaking*" (emphasis added). "Rulemaking" is defined by Section 551(5) as "agency process for formulating, amending, or

repealing a rule." Thus, the distinction between rulemaking and adjudication turns on the definition of "rule."

Section 551(4) defines "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . . ." Under this definition the operating criteria issued by the Secretary are rules. The standards contained in the operating criteria were designed to implement the policy behind the Reclamation Act of 1902. Moreover, the standards operated prospectively; they did not apply in any way to prior water years. Thus, under the APA the Secretary's issuance of the operating criteria was rulemaking and not adjudication.

As rulemaking, the procedure governing the issuance of the operating criteria is contained in 5 U.S.C. § 553. Section 553(a), however, specifically exempts an agency when making rules regarding public contracts. This exception is included "because the principal considerations in most such cases relate to mechanics and interpretation of policy and it is deemed wise to encourage and facilitate the issuance of rules by dispensing with all mandatory procedural requirements. . ." *Duke City Lumber Co. v. Butz,* 382 F.Supp. 362 (D.D.C. 1974) *quoting* S.Rep. No. 752, 79th Cong., 1st Sess. 199 (1945). This exception embraces rules issued by an agency with respect to contracts of the United States or an agency of the United States. *See* Attorney General's Manual on the Administrative Procedure Act, p. 28 (1973).

In the present case, the Secretary's issuance of the operating criteria was pursuant to the 1926 contract, which specifically entrusted the Secretary with authority to issue rules and regulations. The 1926 contract is a contract between the United States and TCID. Therefore, the rules that the Secretary issues pursuant to the contract are not governed by the strictures of the APA.

B. Authority of the Secretary to Issue Operating Criteria.

TCID contends that the amended operating criteria were invalid when promulgated because they were in excess of the Secretary's authority. The operating criteria are claimed to exceed the Secretary's authority in three ways.

First, TCID claims that the requirements imposed by Section C of the operating criteria violated the Secretary's duty not to issue operating criteria which would make operation and maintenance of the irrigation project unduly expensive. The duty upon which the claim relies arises from 43 U.S.C. §§ 390 and 504. Both sections authorize the Secretary to expend funds, but only within the limit of the water users' repayment ability. This limitation, however, only applies to situations where the Secretary has expended funds. There is no similar requirement on funds that the water district is directed to expend. *See* 43 U.S.C. §§ 485e, 485i, 492. The Section C requirements at issue in the present case did not require an expenditure of federal funds. The cost was to be borne directly by the water users. Therefore, the Section C requirements were not in violation of any duty of the Secretary.

Second, TCID contends that the operating criteria's provision for upstream storage of water at Stampede Reservoir violates 43 U.S.C. § 523. Section 523 provides, in part:

> Whenever in carrying out the provisions of the reclamation law, storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of the Interior, preserving a first right to lands and entrymen under the project, is hereby authorized, upon such terms as he may determine to be just and

> equitable, to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with irrigation systems operating under the Act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act [43 USCS § 641], and individuals, corporations, associations, and irrigation districts organized for or engaged in furnishing or in distributing water for irrigation.

TCID contends that this section requires the Secretary to enter a contract for storage of the water before he may issue a regulation requiring the upstream storage.

The contract requirement of Section 523 was designed to cover situations in which one irrigation system has water in excess of the amount required. In such a situation, the Secretary may contract for the transfer of the excess water to another irrigation system. The provision for upstream storage of water at Stampede Reservoir does not, however, dispose of excess water to another irrigation system. The provision merely coordinates the storage of water between Stampede Reservoir and Lahontan Reservoir. Since this provision for alternative storage did not transfer water to another system, Section 523 did not require the Secretary to enter a contract concerning the upstream storage.

Third, TCID contends that the Secretary did not have authority to limit TCID's diversion of water from the Truckee River to 350,000 acre feet for the water year ending October 31, 1973. This contention is without merit. The 1926 contract preserves the Secretary's right to issue rules and regulations. This includes the right to limit diversion of water from the Truckee River.

TCID, however, contends that the Secretary exceeded his authority by issuing regulations which were in violation of the Orr Ditch Decree. The Orr Ditch Decree

granted the United States the right to divert water from the Truckee River for irrigation of the project. This water is "under such control, disposal and regulation as the [United States] may make or desire." The only limitation on the Secretary's ability to regulate the water supply is an upper limit. Here, the Secretary issued a regulation reducing the amount of water to be diverted. Consequently, the reduction was within the Secretary's authority.

C. Arbitrary and Capricious.

TCID contends that the operating criteria are invalid because the Secretary's promulgation of the criteria was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" in violation of 5 U.S.C. § 706(2)(A). To determine whether the Secretary's action was in violation of this section, the Court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416 (1971).

The operating criteria under review in the present case were promulgated by the Secretary under the guidance of Judge Gesell. The court in *Tribe v. Morton* had ordered the Secretary to reconsider the written recommendations in the administrative record in light of his responsibility to the Newlands Project and the Pyramid Lake Indians. The final form of the operating criteria approved by Judge Gesell were found to be consistent with the Secretary's legal and fiduciary obligations. *Tribe v. Morton,* 354 F.Supp. at 261. This finding is not binding but it does indicate that relevant factors were considered and that no error of judgment was made. TCID has provided no evidence which would indicate that relevant factors were not considered or that the criteria approved by the court were clearly errors of judgment. Therefore, TCID's claim

that Section 706(2)(A) has been violated must be denied.

III

ENFORCEABILITY OF THE OPERATING CRITERIA

A. Due Process Clause.

The key issue in the present case in whether the operating criteria approved by Judge Gesell in *Tribe v. Morton* can be enforced against TCID. TCID contends that the operating criteria were in essence a court order and that imposition of the operating criteria upon it results in the enforcement of a judgment rendered in a suit to which it was not a party.

TCID is correct in contending that due process requires that an individual not be bound by a judgment rendered in litigation to which the individual was not a party. *Hansberry v. Lee,* 311 U.S. 32 (1940); *Mallow v. Hinde,* 25 U.S. 193 (1827). The strictures of due process, however, only apply where the absent party will be deprived of interests encompassed by the Fourteenth Amendment's protection of liberty and property. *Board of Regents v. Roth,* 408 U.S. 564, 569 (1971). Thus, before TCID may argue that the judgment in *Tribe v. Morton* deprived it of due process, it must demonstrate that an interest within the Fourteenth Amendment's protection is at stake. *Id.* at 571.

TCID contends that the operating criteria approved by the court in *Tribe v. Morton* have deprived it of three distinct property interests. First, TCID contends that the reduction in the amount of water which may be diverted from the Truckee River has deprived it of non-project water rights in Donner Lake and Independence Lake. The operating criteria, however, do not purport to alter TCID

water rights in either lake. The criteria merely prohibit transporting water by means of the federally owned canal if such diversion into the canal would exceed the limit established by the operating criteria. Thus, the operating criteria do not affect the non-project water rights, they only regulate the use of the federally owned canal.

Second, TCID contends that the Truckee River Agreement (TRA) granted it a right to the excess "diverted flow" reaching Derby Dam. TCID claims that this is a water right which it holds independent of the irrigation project and, thus, is a right which cannot be limited by the Secretary's operating criteria. The TRA, however, was not an adjudication of water rights. It was an agreement among the major water users and was subject to the final disposition of *United States v. Orr Water Ditch Co.*, No. A-3. The final adjudication came in the form of the Orr Ditch Decree, which granted the United States a specific amount of water for use on the Newlands Project. No water rights were given to TCID as an entity. TCID's only interest in the water rights granted the United States by the Orr Ditch Decree arises from its management of the irrigation project under the 1926 contract. In this capacity, TCID's right to water is under the direct control and regulation of the Secretary. Thus, TCID's contention that the TRA grants it water rights independent of the irrigation project and the Secretary's control is without merit.

Third, TCID contends that the operating criteria have deprived it of the right to the continued operation of the irrigation project under the contract terms as they were originally formulated. TCID, however, had no right to continue the operation of the project in any specific manner. Under Article 7 of the 1926 contract, TCID agreed to operate and maintain the project in full compliance with "the rules and regulations of the Secretary now

in force or hereafter promulgated." The contract further provides:

> 34. The Secretary reserves the right, so far as the purport thereof may be consistent with the provisions of this contract, to make reasonable rules and regulations, and to add to and modify them as may be deemed proper, and necessary to carry out the true intent and meaning of the law and of this contract, and the District hereby agrees that in the operation of the transferred works, all such rules and regulations will be fully adhered to.

Since the Secretary had the right to change the regulations at any time, TCID could not have a property interest in the continued operation of the project in any specific manner.

TCID has failed to establish that it was deprived of any property interest by the operating criteria approved by the court in *Tribe v. Morton*. Consequently, imposition of the operating criteria upon TCID did not deprive it of due process.

B. Impairment of Contract.

TCID contends that the Secretary's enforcement of the operating criteria has impaired the 1926 contract in violation of the due process clause. The due process clause, like the contract clause limitation on states, prevents the federal government from rearranging contractual rights and responsibilities. *See Northwestern National Life Ins. Co. v. Jordan,* 447 F.Supp. 856 (D. Nev. 1978). TCID contends that the operating criteria's limitation on the diversion of water from the Truckee River has impaired its right under the contract to use water for power generation, for the pasture land, and for expansion of the project.

The Secretary has the right to promulgate rules and regulations governing operation of the irrigation project. Within this power is the authority to limit water diverted from the Truckee River to that being beneficially used by those holding water rights. The Secretary's exercise of the power did not unconstitutionally impair the rights claimed by TCID because water used for the claimed rights may be restricted. The use of project water for power generation is secondary to its use for irrigation and, thus, may be restricted by the Secretary. *See Burley Irr. Dist. v. Ickes,* 116 F.2d 529 (D.C.Cir. 1940). The use of project water to irrigate the pasture land may also be restricted since there are no decreed water rights for use by direct diversion on the pasture land. *United States v. Alpine Land & Reservoir Co.,* 503 F.Supp. 877, 882 (D.C. Nev. 1980). Finally, water may be used to expand the irrigated acreage only to the extent that water rights are obtained for the additional land. Thus, TCID's claim that the reduction in water to be diverted impaired its contract must fail, since water for the rights allegedly impaired may be limited by the Secretary in a good faith effort to avoid waste of water diverted from the Truckee River.

C. National Environmental Policy Act (NEPA).

TCID contends that enforcement of the operating criteria will violate NEPA because a reduction in the amount of water to be diverted at Derby Dam will have a significant effect on the quality of the environment. TCID is not the proper party to raise the issue.

TCID's purpose in pursuing the NEPA claim was not to promote governmental awareness of environmental problems, but was to protect its interest in continuing to operate the irrigation project. NEPA was not intended to protect plaintiffs, such as TCID, whose sole motivation is their own economic self-interest and welfare. *See Port of Astoria, Oregon v. Hodel,* 595 F.2d 467 (9th Cir. 1979);

Churchill Truck Lines, Inc. v. United States, 533 F.2d 411 (8th Cir. 1976); *Clinton Community Hospital Cor. v. So. Md. Medical Center*, 510 F. 2d 1037 (4th Cir. 1975); *American Motorcyclist Ass'n v. Watt*, 534 F. Supp. 923 (C.D.Calif. 1981); *Benton County Savings & Loan v. Federal Home Loan Bank Bd.*, 450 F.Supp. 884 (W.D.Ark. 1978).

IV

NONCOMPLIANCE WITH THE OPERATING CRITERIA

As previously discussed, the operating criteria were valid and enforceable regulations and, thus, TCID was required by the 1926 contract to implement them. The evidence uniformly demonstrates that TCID failed to comply with the criteria. This was a breach of the 1926 contract. Under the 1926 contract, the Secretary may terminate the contract for breach upon one year's written notice to TCID. The Secretary complied with this provision by mailing TCID a letter, dated September 16, 1973, which notified TCID that the contract would be terminated on October 31, 1974.

In a final effort to avoid the consequences of noncompliance, TCID argues that its breach of the contract is excused because compliance was financially impossible. Impossibility of performance is a valid defense in an action for breach of contract where an extraordinary circumstance has made performance so vitally different from what was expected as to alter the essential nature of performance. In the present case, however, the impossibility claim is not appropriate for two reasons: First, this is not an action for breach of contract. TCID has raised the impossibility claim offensively to reform the contract, instead if defensively. This is not a permissible use of the impossibility doctrine. Even if this claim were properly

raised, it would fail because the Secretary's issuance of the operating criteria was not an extraordinary circumstance. Paragraphs 7 and 34 of the 1926 contract demonstrate that the parties contemplated the Secretary's periodic issuance of rules and regulations and operating criteria have been issued since 1967. TCID's financial inability to comply with the regulations does not turn this into an extraordinary event excusing performance. Restatement (Second) Contracts, § 261 Comment b (1981); 17 Am.Jur.2d Contracts, § 402 (1964).

The evidence demonstrates that TCID made no attempt to comply with the operating criteria issued by the Secretary on March 12, 1973. TCID has tried to avoid the consequences of its refusal to comply by contending that the operating criteria were invalid and unenforceable. The merits of these contentions have been considered and rejected. Our rationale is that the 1973 operating criteria must be shown to be void for TCID to sustain its position. This it cannot do. They clearly fall within the ambit of Secretarial power to prescribe rules and regulations under the 1926 contract.

This action poses a unique case procedurally and juridically. We do not question the right of the Paiute Tribe to attack the 1972 operating criteria as arbitrary, capricious and an abuse of the Secretary's authority. The Tribe chose to do so by action in the District Court for the District of Columbia, naming only The Secretary of Interior as a defendant. It chose not to name as defendants its true opponents, the Lanhontan Project farmers represented by the TCID. The district court chose not to require the joinder of the TCID. The TCID chose not to intervene as a real party in interest. Thus, the action proceeded as an ex parte action in a substantial sense, the Secretary of Interior being pretty much in the position of a stakeholder. The final result was the promulgation of

the 1973 operating criteria at the direction of the court. The Secretary was unquestionably subject to the jurisdiction of the court, and was in jeopardy of contempt if he disdained to comply. The Department of Justice refused to appeal.

There are portions of the District of Columbia decree which cause one to ponder. The opinion does not show that the finding that 288,120 acre feet diversion through the Truckee Canal would ultimately be adequate was any less of a "judgment call" than the 1972 allowed diversion of 378,000 acre feet. Also, it is not at all clear to this Court that the District of Columbia court's directive to the Secretary to invoke the sanctions of Article 32 of the 1926 contract (354 F.Supp. 265) was within the competence and authority of the judge.

Nevertheless, the position adopted by the TCID is even more difficult to understand. First, we note that before amended operating criteria were issued, the TCID notified the Secretary that it would not comply (354 F.Supp. 258). Such an attitude of complete defiance is incomprehensible.

In briefs both the Secretary and the Tribe assert that the remedy that the TCID should have pursued was an action against the Secretary, presumably in the District of Nevada, attacking the validity of the 1973 operating criteria on the same grounds that it has asserted here defensively. In fact, in oral argument, the government attorney, Mr. McElroy, asserted: "This happens all the time." That may be so, but we have failed to find any reported precedent which parallels the procedural conflict which faces us here. This is not the normal case of rules and regulations promulgated in the implementation of a government contract in which only the rights and interests of the government and the other contracting party are at issue. Here, the administration of the Lahontan

Project affects the rights of many parties other than the two contracting parties. It is juridically offensive to this Court to contemplate a situation where in February 1973 a federal district court has supervised the issuance of new operating criteria, and in April 1973 another district court is requested to invalidate them as arbitrary, capricious and in excess of authority. But this possibility seems to be acceptable in view of the defect in parties in the initial action.

Whatever one may think of such a situation, it is nonetheless clear that self-help to the extent to which TCID availed itself is not the remedy. It could not defy the regulations and after notification of contract termination defend upon the ground that if it had presented its case by intervention in the District of Columbia court or if it had prior to termination attacked the new regulations in a Nevada court, grounds for termination of the contract would not have existed.

In consideration of the premises,

IT HEREBY IS ORDERED that plaintiff take nothing by virtue of its complaint and it is hereby declared that the Secretary of Interior has legally terminated the contract dated December 18, 1926, and has a lawful right to possession and control of the Newlands Reclamation Project effective as of November 1, 1974.

DATED August 17, 1983.

/s/ BRUCE R. THOMPSON
United States District Judge

Appendix C: Order, District Court for the District of Nevada, Truckee-Carson Irrigation District v. Secretary of the Department of the Interior, Civil R-74-34-BRT (Denial of injunction pending appeal), Filed October 26, 1983.

In the United States District Court

for the District of Nevada

Civil R-74-34 BRT

Truckee-Carson Irrigation District,
Plaintiff,

vs.

Secretary of the Department of the Interior,
Defendant,

vs.

Pyramid Lake Paiute Tribe of Indians,
Defendant-Intervenor.

[Filed Oct. 26, 1983]

ORDER

Plaintiff has moved for a stay or injunction pending appeal to preclude a takeover by the Secretary of the management of the Newlands Reclamation Project pursuant to the decision of this Court on August 17, 1983. The Secretary and the Paiute Tribe oppose the motion.

Parenthetically, defendant's and intervenor's briefs state or imply that this Court in its opinion approved the operating criteria published in the Federal Register on or about March 12, 1973. Not so. On the contrary, this Court believes many aspects of the criteria to be improvident if not unreasonable. All the Court did was approve the method of promulgation and declare the criteria to be enforceable against TCID until modified or set aside.

The parties agree upon the requisites for an injunctive order. There must be serious questions to be settled on review, irreparable injury to be suffered by appellant, absence of injury to defendants and no infringement on public policy.

We think there are serious arguable issues to be decided on appeal, but it has not been shown that TCID will suffer irreparable injury if management of the project should be assumed by the Secretary and it has not been shown that if an injunction is granted the Paiute Tribe, that is to say, Pyramid Lake, will not suffer damage through loss of water to which it is entitled. While TCID continues in possession and management of the Newlands Project it does so without the supervision by the Secretary of Interior which the 1926 management contract contemplates.

This motion has been made in the trial court following the teaching of *United States v. El-O-Pathic Pharmacy,* 192 F.2d 62 (9th Cir. 1951). While it does not appear probable that the Secretary will take precipitous action in the next few weeks, the Court will nevertheless grant a temporary injunction to afford plaintiff an opportunity to apply to the United States Court of Appeals for the Ninth Circuit.

In consideration of the premises,

IT HEREBY IS ORDERED that plaintiff's motion for a stay or injunction pending appeal is denied on the condition that the Secretary of Interior is hereby enjoined from taking over management and control of the Newlands Reclamation Project from plaintiff for a period of thirty days from date hereof.

DATED October 26, 1983.

/s/BRUCE R. THOMPSON
United States District Judge

Appendix D: Order, Ninth Circuit Court of Appeals, Truckee-Carson Irrigation District v. Secretary of the Department of the Interior, No. 83-2351 (Denial of Petition for Rehearing and Rejection of Suggestion for Rehearing in Banc), Filed October 31, 1984

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-2351

Truckee-Carson Irrigation District,

Plaintiff-Appellant,

vs.

Secretary of Department of Interior,

Defendant-Appellee,

and

Pyramid Lake Paiute Tribe of Indians,

Defendant-Intervenor-Appellee.

[Filed Oct. 31, 1984]

ORDER

Before: SNEED and FLETCHER, Circuit Judges, and BURNS*, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing in banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

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*Honorable James M. Burns, United States District Judge for the District of Oregon, sitting by designation.

Appendix E: Contract between United States of America and the Truckee-Carson Irrigation District, December 18, 1926.

Department of the Interior
Bureau of Reclamation
Newlands Irrigation Project, Nevada

CONTRACT BETWEEN THE UNITED STATES OF AMERICA AND THE TRUCKEE-CARSON IRRIGATION DISTRICT

Providing for the Transfer of the Management of the Irrigation Works to the District and for the Repayment of the Construction costs

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DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
NEWLANDS PROJECT

Contract Between the United States of America and the Truckee-Carson Irrigation District Providing for the Transfer of the Management of the Irrigation Works to the District and for the Repayment of Construction Charges.

1. THIS AGREEMENT, made this 18th day of December, nineteen hundred twenty-six, between THE UNITED STATES OF AMERICA, hereinafter referred to as the United States, acting for this purpose by E.C. Finney, First Assistant Secretary of the Interior, pursuant to the act of Congress approved June 17, 1902 (32 Stat., 388), and acts amendatory thereof or supplementary thereto, including the Act of May 25, 1926 (Public No. 284, 69th Congress) all of which acts are commonly known and referred to as the National Reclamation Laws, and the TRUCKEE-CARSON IRRIGATION DISTRICT, a public corporation, created, organized and existing under and by virtue of the laws of the State of Nevada, with its principal place of business at Fallon, Churchill County, Nevada, hereinafter referred to as the District;

WITNESSETH:

Classes of Land in the Project

2. WHEREAS, the Carson and Truckee divisions of the Newlands Project include within their boundaries irrigable lands which receive their irrigation water supply from the irrigation works constructed by the United States, of which lands about 45,207 acres are covered by water right applications (hereinafter referred to as application land); about 22,148 acres are not now covered by water right applications (hereinafter referred to as

non-application land); and about 20,145 acres are covered by vested water right agreements whereby the United States exchanged full-paid project water rights for private water rights (hereinafter referred to as vested right lands). Of the above lands so classified, approximately 77,600 acres are within the boundaries and included in the District, which includes about 44,000 acres hereinabove designated as application land; about 20,145 acres hereinabove designated as vested right lands, and about 13,455 acres hereinabove designated as non-application lands; and

Previous Agreements.

3. WHEREAS, under public notices heretofore issued by the Secretary of the Interior (hereinafter referred to as the Secretary) applicable to the Truckee and Carson Divisions of the Newlands project, certain entrymen and owners of private lands in the District have made land leveling agreements covering application land, which said agreements have been duly accepted and approved for and on behalf of the United States and constitutes contracts between such landowners and entrymen and the United States; such lands being hereinafter referred to as Government-leveled lands; and

Water Users Desire Benefits of Relief Acts.

4. WHEREAS, the District and the water users therein desire (1) to obtain the benefits of said act of Congress approved May 25, 1926 (Public No. 284, 69th Congress) hereinafter referred to as the Adjustment Act, and (2) to take over the care, operation and maintenance of the irrigation works described in Article six (6) hereof;

NOW, THEREFORE, it is agreed as follows:

Nomenclature.

5. Application land in the District, the owners of which within sixty days after this contract becomes effective, accept same in order to receive the benefits of the Adjustment Act, said acceptance to be by instrument in writing on the form attached hereto as Exhibit A and to be recorded at the expense of the owner with the Recorder of the County where the land is situated, is hereinafter referred to as consenting application land, (which term shall also include land, the owners of which impliedly accept this contract, as provided in Article 12) and the owners thereof as consenting application landowners. Application land in the District, the owners of which do not so accept this contract, will hereinafter be referred to as non-consenting application land, and the owners thereof as non-consenting application landowners. Vested right land in the District, the owners of which accept this contract in like manner and within said period in order to receive an extension of the period within which they may pay their operation and maintenance charges that are delinquent at the date of this contract, said extension to be allowed as provided in Article 8 hereof and in the second paragraph of Section 45 of the Adjustment Act, will be referred to as consenting vested right land, and the owners thereof as consenting vested right landowners. The works to be transferred to the District under Article 6 hereof are hereinafter referred to as the transferred works. The equipment and supplies to be transferred to the District under Article 15 hereof, will hereinafter be referred to as transferred equipment.

Works Transferred.

6. Effective December 31, 1926, there are hereby transferred to the District, the care, operation and maintenance of all lands and works used for operative

purposes, including Lahontan Reservoir lands and Dam, Lake Tahoe lands, Reservoir and Dam, the Derby Diversion Dam, lands and reservoir, Lahontan Power Plant (subject to existing leases), Carson Lake pasture, and all other lands, dams, diversion works, buildings, canals, laterals, sublaterals, ditches, distribution and drainage systems, stock water pipe lines, power distribution lines, telephones and telephone lines, the Fallon office records, files, engineering maps and data, (which records, files, engineering maps and data shall be available at all times for use by the United States) and any other works now operated, owned or used by the United States in connection with the irrigation and development of lands of the Newlands project. No title to any of the works in this paragraph mentioned passes to the District. It is understood that the Secretary will reserve certain of the Fallon office records, files, engineering maps and data for the Denver and Washington offices, and the records, files, engineering maps and data so reserved are not to be transferred to the District, although the District is to have an opportunity to make copies or abstracts of same if desired.

District Accepts Care, Operation and Maintenance of Transferred Works.

7. The District hereby accepts the care, operation and maintenance of the transferred works, and will care for, operate and maintain the same and deliver water therefrom in full compliance with the National Reclamation Laws, as said laws now exist or as they may hereafter be amended or supplemented, court orders and decrees, contracts heretofore entered into between the United States and various persons for the delivery of water, the terms and conditions of this agreement, the rules and regulations of the Secretary now in force or hereafter promulgated; and, in such manner that said

transferred works shall remain in as good and efficient condition and of equal capacity for the development, diversion and distribution of irrigation water and for the development of power as is now the case, reasonable wear and damage by the elements excepted, and will use all proper methods and precautions to secure the economical and beneficial use of irrigation water, the said operation and maintenance and control of said transferred works to be without expense to the United States.

Extension of Time for Payment
of Delinquent Operation and Maintenance
and Delinquent Construction Charges.

8. Within sixty days after this contract becomes effective, application under the second paragraph of Section 45 of the Adjustment Act may be made to the United States for any extensions of time within which the operation and maintenance and construction charges that are delinquent at the effective date of this contract may be paid, together with interest at the rate of six per cent per annum as provided in said section 45, it being understood that the period of extension of time for the payment of delinquent construction charges will be fifteen years, within which time such delinquent construction charges must be paid in full in equal semi-annual instalments on January 15 and July 15 of each year beginning January 15, 1928. It is also understood that the period of extension of time for the payment of delinquent operation and maintenance charges may not exceed five years. The extended operation and maintenance charges will be paid in semi-annual instalments, as nearly equal as possible. Extensions will be allowed only where the landowner shows a financial inability to make payment, and where the District and the Superintendent or other duly authorized representative of the Secretary are of the opinion that an extension should be allowed. The

instalment of the construction charge due in December, 1926, is not to be included among the charges extended, except upon a showing, satisfactory to the Secretary of the Interior, that the landowner is unable to pay this instalment and that he probably would be able to pay the charge, if a period of extension is granted. Delinquent operation and maintenance charges on consenting vested right land may be extended, subject to the same conditions, for a period of not exceeding five years. Consenting owners of Government-leveled land may have the payments due under their land leveling contracts and delinquent at the date of this contract extended as provided above for construction charges. Extensions under this paragraph will be granted only to consenting owners. Within thirty days after the close of the period within which applications for extension of time may be made under the first sentence of this article, the United States will furnish the District, for its use in apportioning benefits, a statement showing for each tract of land in separate ownership upon which an extension has been granted (1) the due dates and respective amounts of such extended instalments, the due dates being the dates when such instalments are due from the District and (2) the due dates and respective amounts of deferred instalment interest charges due under the second paragraph of Section 45 of the Adjustment Act, the due dates of such interest instalments being the dates when the interest instalments are due from the District. Delinquent charges covered by crop mortgages taken by the United States as security for the payment of the same will not be extended under the provisions of this article, except as authorized by the Secretary. The owner of any land outside the District may receive the benefit hereof by petitioning for the inclusion of his land within the District, and upon the inclusion of said land in the district, the District will levy assessments so that the extended amounts due the United

States hereunder may be paid to the United States on the dates due, without deduction on account of the failure of some or any of the water users to pay their taxes when due.

District Assumes Payment of Construction Charges and Acts as Fiscal Agent of the United States.

9. The District hereby assumes liability for and agrees to pay to the United States in the manner hereinafter stated construction charges as follows: (Item 1) the total, as of the date this agreement becomes effective of the unpaid construction indebtedness to the United States, including interest and penalties as determined by the Secretary of all consenting application landowners, including the instalments of construction charges, with interest, that have heretofore come due, but the time for the payment of which may be extended under Article 8 of this contract; (Item 2) the total as of the date this agreement becomes effective of the unpaid and unaccrued land leveling charges (with interest as determined by the Secretary) due the United States from the owners of Government-leveled land, including such charges, and interest thereon as may be extended under Article 8 of this contract; (Item 3) construction charges at the rate of $54.00 per irrigable acre upon the land (whether now in the District or hereafter brought into the District) not now under water right application but which may be brought under water right application or subjected to the payment of construction charges between the date hereof and January 1, 1942; provided, that if on or before January 1, 1942, sufficient land, not now under water right is not subjected to the payment of construction charges to equal or exceed the sum of $500,000, the deficit shall be paid by the District in such instalments and on such dates as the Secretary may then prescribe; (Item 4) the amount (not exceeding

$150,000) expended by the United States in the enlargement of the Truckee-Canal as provided in Article 27 and said construction charges, being the total of Items 1 to 4 inclusive, will so far as application land is concerned, be determined from the Newlands project books, individual water right applications and land leveling contracts and other contracts and applicable public notices. In case of dispute as to the amount of any of the foregoing items, the matter will be determined by the Secretary whose decision will be final and binding upon the parties hereto. The payment of construction charges by the District to the United States as provided in this article, shall continue until the said construction indebtedness hereby assumed and agreed to be paid has been fully met, provided that payment of construction charges shall not be required from the District on unentered or abandoned public lands, while such lands remain in that status. The Secretary agrees, when the federal laws and/or existing contracts permit, to aid the District in the enforcement of its collections to be made from its water users under the terms of this agreement and to that end, will deem it sufficient cause for the cancellation of any entry or water right application made upon land in the District, (which entry or water right application is cancellable upon the failure of the entryman or landowner to pay reclamation charges within one year after same are due) upon receipt of a certified copy of a resolution by the District specifying that any person or persons holding such land has become delinquent in the payment of any operation and maintenance or construction charge and has so remained delinquent for more than a year after such charge became due.

The District is hereby designated fiscal agent of the United States for the purpose of (a) collecting construction charges (with interest or penalty) now or hereafter due to the United States from non-consenting

application landowners within the District, and from application lands not now located within the District, and while without the District (b) collecting construction charges (with interest or penalty) now due the United States and not extended under Article 8 hereof, (c) of collecting any operation and maintenance charges (with interest or penalty) due the United States at the date of this contract, the time for the payment of which is not extended under Article 8 hereof and (d) any other amounts due the United States on the date of this contract on behalf of the Carson and Truckee divisions. The District will forward the funds so collected together with accrued interest or penalties to the United States within 30 days after such collection. Should the District fail or be unable to collect any of the charges for which it is herein authorized to act as fiscal agent of the United States in making collection, and such charges remain unpaid for the period of one year after the date of this contract for all charges now due, and after the period of one year from the due date as to all charges hereafter coming due, the district assumes a primary liability, dating from the termination of said one year period, for the payment of same. The District shall furnish a bond in the penal sum to be fixed by the Secretary to guarantee its faithful performance of its duties as fiscal agent of the United States.

Terms of Payment of Construction Charges Under Individual Contracts Modified.

10. In lieu of the terms of payument of construction charges provided in individual water right applications, land leveling contracts and other agreements on account of consenting application land, the construction charges thereon which are to be paid by the District to the United States (and the construction charges on non-application land, if any) will be paid as follows:

(a) Each consenting application landowner the first payment on whose contract matured on or before December 31, 1916, may complete the payment of his unaccrued and unpaid construction charges in equal semi-annual instalments within 40 years from the date of the first payment which matured under his application.

(b) Each consenting application landowner and each non-application landowner, the first payment of whose construction charge matured or matures later than December 31, 1916, and prior to January 1, 1937, may complete the payment of his construction charges in equal semi-annual instalments, the last of which shall be payable not later than July 15, 1957.

(c) All owners of non-application lands and/or of application lands, the first payment of the construction charges on which may mature subsequent to January 1, 1937, must complete the payment of their construction charges in such number of instalments of such amount per instalment per irrigable acre and on such due dates from the District as may be hereafter fixed by the Secretary.

(d) The Chief Accountant of the Bureau of Reclamation, or one of his representatives, will assist the District in restating the accounts of such consenting landowners under sub-paragraphs (a) and (b) of this article. It is understood that each consenting landowner referred to in said two sub-paragraphs is to complete payment of his construction charges through the District in the number of equal semi-annual instalments of the amount per instalment and on the due dates from the District to the United States as fixed within the limitations stated in sub-paragraphs (a) and (b) hereof by the District and the said Chief Accountant, it being understood that in case of difference of opinion as to matters covered by these sub-paragraphs between the

Chief Accountant and the District, the matter will be finally and conclusively determined by the Secretary. The District hereby assumes a primary liability for the payment of the total of said charges due under the terms of this paragraph on any such date, and will pay said total to the United States on said due date without deductions on account of the failure of some of the water users to meet their assessments when due. The semi-annual instalments of the construction charges on behalf of non-application land will be due on January 15 and July 15 of each year, within the above limitations, the first being due on January 15 of the year following the calendar year when the District finds non-application land now or hereafter in the district to be assessable for construction charges. Notice of such finding shall be given promptly by the District to the Secretary.

Interest on Delinquent Charges.

11. On any charges that may remain unpaid by the District to the United States after the same becomes due from the District interest shall be paid at the rate of six per cent per annum from the said due date to the date of payment.

Accepting Benefit Waives Objection.

12. Every land owner who offers no objection to the apportionment provided for herein, or accepts the benefit of this contract by payment at a lower rate than would otherwise be in effect against his land, or by the acceptance and use of water at times when such land would not be entitled (on account of delinquency in payment) to the delivery of water under the terms of water right applications and public notices heretofore applicable thereto had this contract not been made or not been applicable to such land thereby impliedly consents

to all the provisions of this contract and waives any and all objection thereto.

Operation and Maintenance Charges Payable in Advance.

13. The estimated operation and maintenance charges applicable to each tract of land receiving water through or by the transferred work shall be collected by the District in advance beginning with the effective date of this agreement. In order to conform as closely as possible both to the provisions of Section five (5) of the Act of August 13, 1914 (38 Stat., 686), requiring operation and maintenance charges to be based on the number of acre-feet of water delivered, with a minimum operation and maintenance charge, whether water is used or not, and subsection "N" of the Act of December 5, 1924 (43 Stat., 701), requiring payment of the operation and maintenance charges in advance; it is agreed that the operation and maintenance charges to be collected in advance may be based upon an estimate of the number of acre-feet of water to be used by each tract of land during the ensuing year, and a charge will be made for each acre foot of water to be delivered under such estimate and assumption, but with a minimum operation and maintenance charge per irrigable acre whether the land is irrigated or not, entitling the owner to delivery of not less than one acre-foot of water per irrigable acre at the rate per acre-foot computed on the foregoing assumption.

No Water to be Delivered Without Payment.

14. Pursuant to the provisions of Section three (3) of the Act of Congress of August 13, 1914 (33 Stat., 686), no water shall be delivered to or for any tract of land in the District the owners or holders of which shall be in arrears more than one year for the payment of any annual

construction charge and penalties, or any assessment levied by the District for the purpose of paying such construction charges, or who after the effective date of this agreement shall fail to pay in advance the annual operation and maintenance charges as required by subsection "N" of the aforesaid Act of December 5, 1924, and the District is authorized to require payment of operation and maintenance charges in advance as a toll charge and to withhold delivery of water until full payment thereof is made. The District will make no delivery of water to lands other than vested right land, not subject to the payment of construction charges, unless such charges have been paid in full.

Turning Over Certain Equipment and Supplies.

15. At some suitable time prior to the apportionment of construction charges as provided in Article 22 hereof, the Project Superintendent or other representative selected for that purpose by the Secretary will meet with the Board of Directors of the District and will cause to be submitted to said Board a list of the equipment and supplies used in connection with the operation and maintenance of the transferred works, together with the book value thereof, the said book value being the cost thereof less estimated depreciation. Items on said list which the said Board, or a majority thereof present, shall indicate that the District does not desire to take over will be stricken from the list, and as soon as practicable after the transfer date described in Article (6) hereof the items remaining on the list will be turned over to the District. The value of all equipment and supplies transferred to the District under the provisions of this article shall be added to the total obligation of the District under the terms of this agreement, and shall be paid for in 15 equal annual instalments, and the sums annually payable shall be divided into two (2) equal

instalments payable July 15th and January 15th of each year, beginning with the year 1928, provided that such equipment and supplies required by the United States for use in the construction of drains as provided in the contract dated April 30, 1925, between the District and the United States and in the enlargement of the Truckee Canal as hereinafter provided, shall be retained by the United States until such construction is completed when the District may select all or such portion of said equipment and supplies as it may desire to take over under the terms and conditions hereinabove specified, payment for which shall be made by the District in equal semi-annual instalments on January 15 and July 15 of each year, commencing on the next following January 15th after the date when such equipment is taken over by the District and terminating in 1943. Should any loss accrue to the United States by reason of unsalable equipment and supplies (or equipment and supplies that the United States is unable to dispose of for a sum equal to its book value) being left with the Government after the District has selected such equipment and supplies as it may desire under this Article, such loss shall be added to the sum of $500,000 payable by the District to the United States under Article 9 hereof.

Lands Added to District by Petition or Otherwise.

16. Lands hereafter brought into the District by petition or otherwise shall be entitled to the terms of payment and other benefits fixed in this contract as applicable to application and non-application lands already in the District, except as hereinbefore otherwise stated, and shall likewise be subject to the obligations and conditions applicable to application and non-application lands already in the District. Upon the inclusion of such additional lands in the District, by petition or otherwise, the number of non-application acres thus included will be

added to the number of acres of non-application lands already in the District in determining (a) the total obligation of the District to the United States, and (b) the amounts of the semi-annual construction charge instalments due the United States hereunder, and the District shall apportion to such application and non-application lands so brought in by petition or otherwise construction and operation and maintenance benefits in the same manner as such benefits are apportioned to application and non-application lands already in the District; provided, however, that no lands shall be excluded from the District without first having had and obtained the written consent of the Secretary; and provided further, that when the Secretary shall so request, and when settlement and economic conditions permit, the District shall take all necessary steps to have included in the District public lands of the United States situate in Churchill and Lyon counties, Nevada, which may be susceptible of irrigation from the transferred works. The District will at its own expense construct laterals or other irrigation facilities needed to deliver water for such additional lands, provided always, that the District shall not be required to construct laterals or other irrigation facilities for Indian lands in the project, unless arrangements are made, satisfactory to the District, to meet the cost of such laterals or irrigation facilities for such Indian land.

Cooperation Between the United States and the District in Guiding Settlement.

17. The United States will not approve any application for a water-right covering irrigable lands in the Carson and Truckee Divisions of the Newlands project, outside of the District boundaries, except upon recommendation of the District.

Operation and Maintenance Charges for Vested Right Lands.

18. Nothing in this contract contained shall be construed as prohibiting the District from establishing uniform operation and maintenance rates for all lands embraced within the District.

Selection of Manager or Superintendent.

19. Until completion of payment to the United States of the construction charges against the lands of the District, the District shall employ as project manager or superintendent a competent person who shall have had experience in the operation of similar irrigation works. The selection of said person shall be subject to the approval of the Secretary, and upon notice from the Secretary that said project manager or superintendent is or has become unsatisfactory the District shall within a reasonable time, and without delay, and as often as such notice is given, terminate the employment of such unsatisfactory employee and employ one acceptable to the Secretary.

District to Keep Books and Records.

20. In order that the United States may withdraw as completely as possible under the law from the care, operation and maintenance of the transferred works, the District shall:

(a) Install and maintain a modern set of books of account, to be acceptable to the Secretary, showing all the financial transactions of the District, and furnish such financial reports and statements as may be required from time to time by the Secretary;

(b) Keep each year a careful and accurate record of the water supply and the disposition of the same, and

furnish such detailed reports concerning the same as may be required by the Secretary;

(c) Keep and report such other records as the Secretary may require and in the manner and form he may require.

Inspection of Transferred Works.

21. The Secretary shall cause to be made from time to time a reasonable inspection of the transferred works to ascertain whether the terms of this contract are being satisfactorily executed by the District. Such inspection shall include examinations of the transferred property and the books, records and papers of the District, together with examinations in the office of the Bureau of Reclamation of all contracts, papers, plans, records and programs connected with the said property, as well as any expense incurred by the United States in 1927 in connection with arranging for the transfer to the District of the project irrigation system and works. The actual expense of such inspection as found by the Secretary, in any one calendar year, shall be paid by the District to the United States on July 15, of each year following the year in which such inspection is made, or the expense herein in this article provided for is incurred.

Apportionment of Benefits.

22. The District shall apportion benefits against each tract of consenting application land now in the District, of application land hereafter brought into the District and of non-application land, now or hereafter in the District, when in the opinion of the board of directors of the District construction charge assessments shall be initiated upon any tract of non-application land now or hereafter in the District, the Secretary to be notified of

such opinion or finding as provided in Article 10, in the amount of the unpaid balance of the construction charges remaining against such lands as provided herein, and shall also apportion benefits equitably against the District lands in the amount of the remaining indebtedness herein assumed by the District, and annual assessments shall be levied against such lands until the full construction charges apportioned to each tract shall have been paid in full. If necessary the District shall levy an assessment upon its lands each year in order to obtain a sum sufficient to meet delinquencies of past year and/or the estimated delinquencies for the current year. Such assessments may be levied upon the lands of the District even though the construction charges thereon have been fully paid, and the sums paid by the owners of such lands to make up the deficiencies due to the failure of others to make payments shall not be considered as payment on the construction charges assessed against such lands upon which such payments are made.

Release of Liens After Apportionment of Benefits.

23. After the confirmation of the apportionment of benefits hereunder the lien of the individual water right applications and land leveling contracts heretofore made, and also the liens reserved in the patents, shall (subject to the provisions of Section two of the Act of Congress of May 15, 1922, 42 Stat., 541), be released as to all consenting application lands.

Charges a General Obligation of the District.

24. The District is obligated to pay to the United States the full amounts herein agreed upon according to the terms stated regardless of individual default in the payment of any assessment levied by the District but it is understood and agreed that when construction

assessments on any tract of land in the District have been paid in an aggregate amount equal to the full amount of such land's construction charges and of all the items mentioned in this agreement, such tract of land (hereinafter referred to as paid-up land) shall thereafter be liable for construction assessments for the purpose of meeting the obligations of the District under this contract only in the event that the District is delinquent in its payment to the United States, and/or only to the extent that assessments are levied to meet estimated or existing delinquencies in the payment of charges, and may be assessed at a lesser rate than the rate applicable to lands of similar class which are not paid up in full, if such lesser rate, together with the District's other collections are sufficient to meet the District's obligations, or estimated obligations to the United States, and in the event of such delinquencies on the part of the District and/or the collections of construction assessments from such paid-up lands it shall be the duty of the District to refund to the owners of such paid-up lands the construction assessments collected therefrom in excess of the total construction charge pertaining thereto, or so much of said excess as can be paid out of the funds available as soon as there are sufficient funds available in the Treasury of the District, and not required to pay the District's obligations to the United States, either under this agreement or other agreement or agreements, or the cost of the operation and maintenance of the transferred works, and the maintenance of the District organization.

District to Use All Powers to Collect Agreed Charges.

25. The District agrees that it will cause to be levied and collected all necessary assessments and will use all the powers and resources of the District, including the taxing power of the District and the power to withhold delivery of water, to collect and pay to the United States

all charges provided for in this agreement in full on or before the day that the same become due.

Profits From the Sale of Power and other Privileges.

26. The Secretary hereby fixes the net accumulated power revenues of the Newlands project as of June 30, 1926, as being the sum of $135,810.88 and likewise determines the net profits from the leasing of project grazing and farm lands and the sale or use of town sites as of June 30, 1926 as being the sum of $26,470.69, making a total sum of $162,281.57, which together with the net profits from the same sources for the six months' period ending December 31, 1926 (as said six months' net profits are determined by the Secretary) shall be credited to the construction charge obligation herein assumed by the District. Such credit will be allowed to the District in semiannual instalments as nearly equal as practicable, applicable to the first to sixtieth, both inclusive, semi-annual instalments of the construction charge coming due from the District to the United States hereunder. Commencing with the calendar year ending December 31, 1927, and annually thereafter the net profits from such sources may be used by the District to be credited annually first on account of construction charges, second, on account of operation and maintenance charges and, third, as the District may direct but no distribution to individual water users shall be made out of any such profits before all obligations to the United States shall have been fully paid.

Derby Dam to be Repaired and the Truckee Canal to be Restored to its Original Capacity by the United States at the Expense of the District.

27. The United States agrees to expend the sum of not to exceed $150,000 in making repairs to Derby

Diversion dam and repairs and enlargements of the Truckee Canal, subject to the availability of appropriations therefor by Congress. The District will repay to the United States the sum so expended in sixty equal semi-annual instalments without interest, payable on January 15 and July 15 of each year, commencing on January 15 of the year succeeding the completion of the expenditure by the United States, in accordance with the Secretary's notice thereof to the District. In the event of the extension of the Newlands project whereby any lands are irrigated through the Truckee Canal other than the lands now embraced in the Carson and Truckee divisions, the District shall receive credit on the payments to be made by it as provided in this article in a ratable proportion based upon the relative irrigable areas involved, as determined by the Secretary.

United States Reserves Right to Use Truckee Canal.

28. The United States reserves the right to, and the District agrees that it may, use the Derby Diversion Dam for the diversion of waters for the Spanish Springs Division of the Newlands project, and that it may use the Truckee Canal, or such portion thereof as the Secretary in his judgment may deem necessary or advisable for the conveyance and delivery of such waters. The United States also reserves the right to and the District agrees that it may, construct such structures in the said Truckee Canal as may be necessary or convenient in the delivery of water for said Spanish Springs Division; provided, however, that the construction of such structures and the maintenance thereof shall be without expense to the District. The cost of operating and maintaining such diversion dam, and such portion of the Truckee Canal as may be used by the United States in carrying and delivering water for said Spanish Springs Division, shall be borne by each party in the proportion that the amount

of water diverted and carried for either party hereto bears to the total amount of water diverted and carried. The United States if it makes use of the Derby Dam and the Truckee main canal, under the power reserved in this article, will allow the District credit annually on any amounts due under this agreement for the Government's proportion, as determined by the Secretary, of the cost of operating and maintaining said diversion dam, and such part of said canal as may be used by the United States.

Keeping Transferred Works in Repair.

29. No substantial change in any of the transferred works shall be made by the District without first having had and obtained the written consent of the Secretary, and the Secretary's opinion as to whether any change in any of the transferred works is or is not substantial shall be conclusive and binding upon the parties hereto. The District shall promptly make any and all repairs to the transferred works which in the opinion of the Secretary are deemed necessary for the proper care, operation and maintenance of the transferred works. In case of neglect or failure of the said District to make such repairs, the United States at the option of the Secretary may take back the care, operation and maintenance of the transferred works, or may cause the repairs to be made and charge the cost thereof to the District, and the District shall make, levy and collect sufficient operation and maintenance assessments to pay the same to the United States in addition to providing the necessary funds to meet the other obligations of the District. The cost to the United States of making any of the repairs contemplated by this article shall be repaid by the District to the United States together with and in addition to the first instalment of charges falling due hereunder hereafter.

Contract Does Not Affect Certain other Agreements.

30. The transfer of the care, operation and maintenance of the Lahontan Power Plant shall not affect that certain agreement bearing date January 29, 1923, between the United States and the Canyon Power Company, a corporation, covering the lease of said power plant and power privileges at Lahontan Dam and Reservoir, save and except that the District is hereby authorized and empowered to collect and receive all moneys due from said power company to the United States under the terms of said lease and to take, use and dispose of all electrical energy therein in said agreement reserved for the use and benefit of the United States. This agreement shall not in any manner change, alter, modify or affect either of the following listed agreements:

Agreement dated January 22, 1921, between the United States and the Truckee-Carson Irrigation District covering the construction and operation and maintenance of drainage works.

Agreement dated April 30, 1925, between the United States and the Truckee-Carson Irrigation District covering the construction and operation and maintenance of certain drainage works.

The District does, however, hereby assume and agree to carry out, all the obligations assumed by, and shall enjoy the benefits conferred upon, the United States by all those certain agreements between the United States and various water users on or in the vicinity of the Newlands project covering the sale and purchase of electricity.

Community Pasture Lease and Operation and Maintenance Deficit Contract Abrogated.

31. That certain contract dated May 25, 1922, between the United States and the District, known as the operation and maintenance deficit contract, and that certain contract dated June 30, 1925, between the United States and the District known as the Carson Lake Community Pasture Lease are each hereby terminated, the said contract of May 25, 1922, having been nullified by the charge-off authorized by Congress in the Adjustment Act and the Community Pasture Lands being included in the transferred works hereinabove described to be operated and controlled by the District without the payment of further rentals after the expiration of the year ending December 31, 1926.

Contract May be Terminated in Case of Breach.

32. In case of the breach of any of the terms or conditions of this contract by the District, the United States reserves the right, upon one year's written notice to the District, to terminate this contract; and upon the termination hereof the transferred property shall be returned to the United States in as good condition as when received, reasonable wear and damage by the elements excepted; provided, however, that in the event the District fails to carry out in accord with its correct intent and meaning that certain decree of June 4, 1915, entered in the District Court of the United States in and for the Northern District of California, Second Division, in the suit entitled "United States of America, Plaintiff, vs. The Truckee River General Electric Company, a corporation, Defendant" and designated therein as number 14861, then and in that event this contract may be terminated upon fifteen days' written notice to the District. Such return of the transferred works shall not

affect the amount and terms of construction charges as herein provided. The waiver of a breach of any of the provisions of this agreement shall not be deemed to be a waiver of any other provision hereof or of a subsequent breach of such provision.

District Contracts to be Approved by Secretary.

33. No contract affecting the lands within the boundaries of the District, made by the District with reference to the care, operation and maintenance of the transferred works, or the delivery of water therefrom, except contracts for the usual labor, equipment, supplies and services in connection with the operation and maintenance of the transferred works, shall be valid until approved by the Secretary, and a copy of all such contracts shall be submitted to and approved by the Secretary before execution.

Rules and Regulations.

34. The Secretary reserves the right, so far as the purport thereof may be consistent with the provisions of this contract, to make reasonable rules and regulations, and to add to and modify them as may be deemed proper and necessary to carry out the true intent and meaning of the law and of this contract, and the District hereby agrees that in the operation of the transferred works, all such rules and regulations will be fully adhered to.

Quantity of Water to be Delivered to District.

35. The quantity of water decreed to the United States by the District Court of the United States in and for the District of Nevada in the suit entitled "The United States of America, Plaintiff, vs. Orr Water Ditch Company, a corporation, et al., Defendants," and

designated therein In Equity, Docket No. A-3, which may be diverted by the District shall be an equitable proportion, as nearly as practical operations will permit, of the water actually available at that time for all the irrigable area of the Carson and Truckee Divisions of the Newlands project. The provisions of this article shall also apply as to any water decreed to the United States by the District Court of the United States in and for the District of Nevada in the suit entitled "The United States of America, Plaintiff, vs. Alpine Land and Reservoir Company, a corporation, et al., Defendants," and designated therein In Equity, D-183, and/or any other suit or proceeding that may be hereafter instituted concerning the waters of the Truckee River and/or the Carson River, and/or the tributaries of such streams or either of them; provided, however, that the provisions of this article shall not be construed or held as entitling, nor shall it entitle, the lands of the Truckee and Carson Divisions of the Newlands project to any of the waters of the aforesaid streams which may be impounded and stored for use upon lands of the Spanish Springs Division of said project and/or any other divisions thereof where the cost of facilities for impounding and storing such waters is assessed to and repaid by such lands, but the lands of said Truckee and Carson Divisions shall have a prior right to the economical and beneficial use of all such waters in sufficient quantity to properly irrigate 87,500 acres of land, and until such priority has been satisfied none of the waters of the aforesaid streams shall be diverted or impounded by the United States for use upon other lands. In no event, however, shall any liability accrue against the United States, its officers, agents, or employees, or any of them, for damage direct or indirect arising from floods, drought, hostile diversion, interruption of service made necessary by repairs,

unavoidable accidents, shortage of water supply or other cause.

Miscellaneous Expenses.

36. (a) After the care, operation and maintenance of the transferred works has been turned over to the district, the parties hereto shall cooperate in obtaining necessary data and evidence for presenting the Government's case in that certain suit now pending in the District Court of the United States in and for the District of Nevada, entitled "The United States of America, Plaintiff, vs. Alpine Land and Reservoir Company, a corporation, et al., Defendants," and designated therein as In Equity D-183. The District shall bear such expense as would otherwise be charged to the Carson and Truckee divisions of the Newlands project. No expense shall be incurred in this connection by either of the parties hereto, without the consent of the other party.

(b) Any expense of administering the decree in that certain suit or proceeding particularly mentioned in paragraph (a) of this article which may be assessed against the United States shall be paid by the District. Upon failure of the District to do so, such expense may be paid by the United States, and the amount thereof shall be added to the next instalment of charges due from the District hereunder.

(c) All expense of administering the decree in the aforesaid suit of the United States of America, Plaintiff, vs. Orr Water Ditch Company, a corporation, et al., Defendants, which may be assessed against the United States, shall be paid by the District except such portion thereof as may be determined by the Court as chargeable to the Pyramid Lake Indian Lands, and in the event the District fails to make such payments, the same may be paid by the United States, and the amount thereof shall

be added to the first instalment of charges thereafter due from the District hereunder.

(d) The District shall reimburse the United States for any and all damages that may be awarded in the District Court of the United States in and for the District of Nevada, in an action entitled "The United States of America, Plaintiff, vs. John W. Freeman Company, a corporation, Defendant," and designated therein as case Number 852. Such amount shall be due the United States at the same time and in addition to the first instalment of charges due the United States hereunder after judgment in said suit has been fully satisfied.

(e) The District shall bear all cost of administration of that certain decree of June 4, 1915, entered in the District Court of the United States in and for the Northern District of California, second Division, in the suit entitled "United States of America, Plaintiff, vs. The Truckee River General Electric Company, a corporation, Defendant," and designated therein as number 14861.

Certain Areas Excluded from the Project.

37. The lands in the District found by the Board of Survey and Adjustment to be permanently unproductive because of lack of fertility in the soil, shall upon request of the owners thereof, and upon their accepting the provisions of this contract, be excluded from the project, and no water shall thereafter be delivered to them unless and until they are restored to the project by proper proceedings. The water right formerly appurtenant to such permanently unproductive lands shall be disposed of by the United States under the Reclamation Law; provided, that the water users within the project shall have a preference right to the use of the waters; and provided further, that any surplus waters temporarily available may be furnished upon a rental basis for use on

lands excluded from the project under this article, on such terms and conditions as may be approved by the Secretary. After such lands have been excluded from the project, the construction charges theretofore paid thereon shall be applied as a credit on the charges (both construction and operation and maintenance) due or to become due on any remaining irrigable lands covered by the same water-right contract. If the charges so paid exceed the amount of all water-right charges due and unpaid, plus the construction charges not yet due, credit therefor shall be allowed the District on the first instalment of charges due the United States hereunder after such lands have been excluded, and the District shall promptly make suitable adjustment with the landowners involved. In the event all the irrigable lands of a water-right applicant are with his consent excluded from the project as permanently unproductive, and no exchange of lands is made as provided in section forty-four (44) of the Act approved May 25, 1926 (Public No. 284, 69th Congress), and as provided in the rules and regulations of the Secretary promulgated thereunder, the total construction charges theretofore paid, less any accrued and unpaid charges on account of operation and maintenance, shall be refunded to the record owner of such lands by the United States, and all construction charge obligations of such landowners shall be released.

Construction Charges Suspended on Certain Areas.

38. The lands found by the Board of Survey and Adjustments to be temporarily unproductive for lack of fertility in the soil, shall be relieved of any further payment of construction charges until such time as the Secretary shall declare them to be possessed of sufficient productive power to be placed in a paying class, and shall give notice thereof to the District, whereupon payment of construction charges against such area shall be resumed.

The opinion of the Secretary that the areas on which payments of construction charges have been suspended have become possessed of sufficient productive power to be placed in a paying class, shall be final and conclusive and binding upon the parties hereto. While the said lands are so classified as temporarily unproductive and the construction charges against them are suspended, water for irrigation purposes may be furnished upon the payment of the usual operation and maintenance charges. Should any of the lands in this paragraph particularly described, in the future be found by the Secretary to be permanently unproductive, they shall thereupon, upon request of the owners thereof, be excluded from the project, and they shall thereupon be treated in the same manner as the lands particularly described in Article thirty-seven (37) hereof.

District to Save United States Harmless.

39. After the transfer of said transferred works, the District shall save the United States, its officers, agents, servants, and attorneys, harmless as to any and all damages which may in any manner grow out of the care, operation and maintenance of the transferred works.

Contract to be Authorized by Election and Confirmed by Court.

40. The execution of this contract shall be authorized by the qualified electors of the District at an election held for that purpose. Thereafter, without delay, the District shall prosecute to decree proceedings in court for a judicial confirmation of the authorization of this contract and the apportionment of benefits provided herein. The United States shall not be in any way bound to continue to proceed under the terms of this contract unless a confirmatory final judgment in such proceedings shall

have been rendered, including final decision in any appeal prosecuted therefrom. The District shall without delay furnish the United States for its files, certified copies of all proceedings relating to the election upon this contract and the confirmation proceedings in connection therewith.

Delivery of Water to Lands Outside of District.

41. The District shall maintain and operate for the United States all canals, laterals, sublaterals and ditches now used for the delivery of water to lands under water-right application, but not included within the boundaries of the District, and will deliver irrigation water to all such land, all water to be so delivered to be an equitable share of the entire water supply available for the Truckee and Carson Divisions of the Newlands project. For such service the District, acting for and on behalf of the United States, is hereby authorized and empowered to charge and collect from such lands annually the same amount of operation and maintenance charge per acre that is charged lands within the District. All construction charges due from such lands shall be paid to the District as Fiscal Agent of the United States, until such time as said lands may be included in the District.

Plans for New Construction to be Approved by United States.

42. In the event any of the unentered irrigable lands in the Truckee and the Carson Divisions of the Newlands project is entered and requires additional construction work for the proper irrigation of such lands or any portion thereof, the District will construct such additional work according to plans and specifications approved by the United States, provided, however, that the District and the United States shall cooperate so as to secure new settlement in compact form so far as

practicable. This article is not to obligate the District to construct new laterals and irrigation structures, unless in its opinion expenditure therefor is justified, taking into consideration the cost of the new work and the benefits to be afforded the new land.

Taxation of Government Land.

43. All unentered public lands and entered lands for which no final certificate has been issued, now located within the district (or hereafter annexed to the District upon the Secretary's consenting, in the case of land hereafter annexed to the District, to the taxation hereunder of such added land, which consent will be manifested by a letter filed with the District, a copy of such letter to be filed with the General Land Office and a copy with the Local Land Office at Carson City, Nevada) and described, so far as concerns land now located within the District in a statement marked Exhibit B attached hereto and made a part hereof, are hereby designated as subject to the provisions of the act of August 11, 1916, 39 Stat., 506, and the act of May 15, 1922, 42 Stat., 541. Vacant public lands, however, now in the district or hereafter added to the district are not to be subject to assessment while in that status.

Interest in Contract Not Transferable.

44. No interest in this agreement is transferable by the District to any other party, and any such attempted transfer shall cause this contract to become subject to annulment at the option of the United States.

Rights Reserved under Section 3737 Revised Statutes.

45. All rights of action for breach of this contract are reserved to the United States as provided in Section 3737 of the Revised Statutes of the United States.

Remedies Under Contract Not Exclusive.

46. Nothing contained in this contract shall be construed as in any manner abridging, limiting or depriving the United States of any means of enforcing any remedy either at law or in equity for the breach of any of the provisions hereof which it would otherwise have.

Member of Congress Clause.

47. No member of or Delegate to Congress or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom. Nothing, however, herein contained shall be construed to extend to this contract if made with a corporation for its general benefit.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed the day and year first above written.

THE UNITED STATES OF AMERICA
By E. C. FINNEY,
First Assistant Secretary of the Interior

TRUCKEE-CARSON IRRIGATION DISTRICT
By C. E. KENT, President

Attest:
L. V. Pinger, Secretary

Appendix F: Truckee River Agreement (Excerpted), June 13, 1935.

TRUCKEE RIVER
AGREEMENT

Approved as to form by
HAROLD L. ICKES
Secretary of the Interior
United States of America

June 13, 1935

THIS AGREEMENT made this 1st day of July, 1935, by and between:

UNITED STATES OF AMERICA (hereinafter called the "United States"), party of the first part,

TRUCKEE-CARSON IRRIGATION DISTRICT, an irrigation district organized and existing under the laws of the State of Nevada (hereinafter called the "Irrigation District"), party of the second part,

WASHOE COUNTY WATER CONSERVATION DISTRICT, an irrigation district organized and existing under the laws of the State of Nevada (hereinafter called the "Conservation District"), party of the third part,

SIERRA PACIFIC POWER COMPANY, formerly The Truckee River General Electric Company, a corporation incorporated under the laws of the state of Maine (hereinafter called the "Power Company"), party of the fourth part,

SUCH OTHER USERS OF THE WATERS OF THE TRUCKEE RIVER and or it tributaries within the Conservation District as shall become parties to this agreement by signing their names hereto, parties of the fifth part,

WHEREAS, the parties hereto (other than the Conservation District) are users and/or diverters of water flowing from Lake Tahoe and/or in the Truckee River and its tributaries in the State of Nevada, and all of the parties hereto desire to conserve the waters of said lake and River and its tributaries, and to raise and stabilize the mean elevation of the water surface of said Lake, in order that said parties and the owners of lands bordering on or in the vicinity of said Lake may obtain the benefits arising therefrom; and

WHEREAS, it is necessary for the accomplishment of the foregoing objects that additional facilities for the storage of flood waters of the Truckee River and its tributaries be constructed and or acquired; that rates of flow of winter draft from Lake Tahoe be reduced; and that the parties hereto cooperate with each other as provided herein; and

WHEREAS, the United States, for the purpose of providing for the irrigation of lands within the Newlands Reclamation Project in the State of Nevada and carrying out the provisions of the Act of Congress of the United States approved June 17, 1902, entitled: "An Act appropriating the receipts from the sale and disposal of public lands in certain states and territories to the construction of irrigation works for the reclamation of arid land", (32 United States Statutes at Large, p. 383; United States Code, Title 43, Sec. 411 et seq.) and acts amendatory thereof and supplemental thereto, heretofore acquired an easement and right of exclusive possession and enjoyment in, over and upon certain lands (including the dam and controlling works) at the outlet of Lake Tahoe under and pursuant to a judgment and decree entered by the District Court of the United States, in and for the Northern District of California, Second Division, on June 4, 1915, and a final order of condemnation entered June 28, 1915, in the cause therein numbered 14861, brought by the United States as plaintiff against said The Truckee River General Electric Company as defendant, by which judgment and decree the manner of operation of said dam and controlling works by the officers and agents of the United States for the purpose of securing the rights of the United States and said The Truckee River General Electric Company in and to the use of the waters therein mentioned was prescribed; and

WHEREAS, the Irrigation District consists of approximately 87,500 acres of irrigable land situate in the Counties of Lyon, Churchill, Washoe and Starey in the State of Nevada, comprising the Truckee and Carson Divisions of the Newlands Reclamation Project, all of which land is wholly or partially dependent for irrigation upon water diverted from the Truckee River and its tributaries into the Truckee Canal and/or Lahontan Reservoir in said Project, and after the entry of said judgment and decree the United States entered into an agreement with the Irrigation District, dated December 18, 1926, whereby the United States transferred to the Irrigation District, and the Irrigation District assumed, the care, operation and maintenance of said dam and controlling works and other properties and also the care, operation and maintenance of said Newlands Reclamation Project, system of works and custodial possession thereof; and

WHEREAS, the United States heretofore filed a suit in the District Court of the United States in and for the District of Nevada, wherein the United States is plaintiff and Orr Water Ditch Company and other users of the waters of the Truckee River are defendants (which suit is referred to herein as the "Truckee River Adjudication Suit" and is numbered in the records of said Court In Equity A-3 and is now pending therein), for the purpose of obtaining an adjudication of the rights of the users in the State of Nevada to the waters of the Truckee River and its tributaries in the State of Nevada, in which suit said Court, on the 13th day of February, 1926, after a full hearing of the parties to said suit, made and caused to be entered a Temporary Restraining Order, in which is set forth the relative rights and priorities of the parties to said suit in and to the waters of Lake Tahoe and of the Truckee River and its tributaries as found by said Court; and

WHEREAS, the Conservation District was organized for the purpose (among others) of capturing, storing and conserving waters of the Truckee River and its tributaries to supplement the supply of irrigation water for the benefit of lands within its boundaries (including the lands commonly known as the Truckee Meadows situate within said Counties of Washoe and Storey), and for the further purpose of expediting the entry of a final decree in said Truckee River Adjudication Suit, and in furtherance of said first mentioned purpose has heretofore acquired certain valuable application rights to store unappropriated water of the Truckee River and its tributaries; and

WHEREAS, the Power Company is the owner of certain rights in and to waters of Lake Tahoe and the Truckee River and its tributaries and owns and operates certain hydro-electric power plants situate on said River and supplies electrical energy thereform to the public in the States of California and Nevada and to the inhabitants of the Cities of Reno and Sparks and vicinity, and also supplies water to said inhabitants for municipal and domestic uses and for irrigation and stock purposes; and

WHEREAS, the parties of the fifth part herein or their predecessors in interest, are defendants in said Truckee River Adjudication Suit and are owners of rights in and to waters of the Truckee River and its tributaries for the irrigation of lands situate within the boundaries of the Conservation District in the State of Nevada and other beneficial uses, and will be benefited by the conservation of water resulting from the acquisition or construction of the works herein provided to be acquired and/or constructed, and by the carrying out of the provisions of this agreement; and

WHEREAS the carrying out of the provisions of this agreement will assist in conserving the waters of said Lake and River and its tributaries and will obviate expensive and continued litigation and aid in effecting necessary flood control of the waters of said river and its tributaries:—

NOW, THEREFORE, THIS AGREEMENT WITNESSETH:

ARTICLE I. Definitions.

The following terms used in this agreement, when capitalized, shall have, for the purposes of this agreement, the meanings hereinbelow set forth in this article:

(A) DIVERTED FLOW means the total amount at any specified time of all water diverted from the Truckee River (determined by simultaneous measurements in cubic feet per second), at points between ICELAND GAGE and Derby Dam (including water diverted by the Truckee Canal and the water by-passed at Derby Dam in excess of irrigation requirements below Derby Dam as provided in the TRUCKEE RIVER FINAL DECREE), consisting of (1) NATURAL FLOW, (2) water released from Lake Tahoe, (3) water released from SUPPLEMENTAL RESERVOIR, and (4) PRIVATELY OWNED STORED WATER referred to in subparagraph (4) of Paragraph (A) of Article III of this agreement; provided that DIVERTED FLOW shall not include: (1) released PRIVATELY OWNED STORED WATER (other than PRIVATELY OWNED STORED WATER referred to in subparagraph (4) of Paragraph (A) of Article III hereof), (2) NATURAL FLOW in excess of FLORISTON RATES at ICELAND GAGE, (3) water diverted for the generation of electrical energy and other power, and/or for the removal of ice as provided in

Paragraph (E) of Article III and Paragraph (B) of Article V hereof, which is returned to the Truckee River.

The amount of DIVERTED FLOW at any specified time shall be determined by adding: (1) the amounts of all waters diverted at such time from the Truckee River by conduits having their places of diversion in said River between ICELAND GAGE and Derby Dam (including Truckee Canal) and (2) the amount of water (if any by-passed at Derby Dam in excess of irrigation requirements below said Derby Dam as provided in the TRUCKEE RIVER FINAL DECREE, and subtracting from the result of such addition the aggregate of: (1) the amount of water diverted at such time for the generation of electrical energy or other power, and/or for the removal of ice as mentioned in paragraph (E) of Article III and Paragraph (B) of Article V of this agreement, and which is returned to said River, (2) the NATURAL FLOW at ICELAND GAGE in excess of FLORISTON RATES, (3) the amount of PRIVATELY OWNED STORED WATER (other than PRIVATELY OWNED STORED WATER referred to in subparagraph (4) of Paragraph (A) of Article III hereof) diverted at such time by said conduits. The result shall be the amount of DIVERTED FLOW at such time. For the purposes of the foregoing computations all measurements of water shall be made in cubic feet per second.

(B) FLORISTON RATES means the rate of flow in the Truckee River at the head of the diversion penstock at Floriston, California (but measured at the ICELAND GAGE) consisting of an average flow of 500 cubic feet of water per second each day during the period commencing March 1 and ending September 30 of any YEAR, and an average flow of 400 cubic feet of water per second each day during the period commencing October 1 and ending the last day of the next following February of any year.

(C) ICELAND GAGE means a measuring device located in the Truckee River between the point of diversion of the penstock at Floriston, California, mentioned in the 1915 DECREE, and the point of confluence of Gray's Creek and the Truckee River, which gage is used to determine the rate of flow of water in the Truckee River at said point.

(D) MUNICIPAL AND DOMESTIC USES of water means the use of water, delivered through the mains of the distribution system of the Power Company, for municipal, domestic, sanitary, fire protection, lawn and residential garden irrigation, industrial and/or all other similar uses, exclusive, however, of use for the irrigation of farm areas.

(E) NATURAL FLOW means all water (including water now contributing to Lake Tahoe) flowing in the Truckee River and its tributaries, exclusive of:

(1) water artificially impounded in Lake Tahoe, SUPPLEMENTAL RESERVOIR, or elsewhere, and released into said River, or its tributaries, and water diverted from any water shed (other than the Truckee River water shed) and released into said River, or its tributaries; and

(2) that portion of the flow in Hunter Creek actually diverted by the Power Company in accordance with and for the uses provided in, the TRUCKEE RIVER FINAL DECREE.

Water diverted from the Truckee River and/or its tributaries for irrigation, domestic, municipal and/or livestock watering purposes which, after use, is returned through seepage or otherwise to said River shall, after its return to said River, be deemed part of the NATURAL FLOW thereof; provided, however, that the classification of water diverted for the generation of electrical energy

or other power purposes shall not, after the return of such water to said River, be changed by reason of such diversion.

(F) 1915 DECREE means the judgment and decree entered in the District Court of the United States, in and for the Northern District of California, Second Division, on June 4, 1915, in the cause therein entitled "United States of America, plaintiff, v. The Truckee River General Electric Company (a corporation), defendant", numbered 14861, a copy of which judgment and decree is attached hereto, marked "Exhibit C" and by reference made a part hereof.

(G) OPERATIVE DATE OF THIS AGREEMENT is the date when all of the Articles of this agreement are effective, as provided in Paragraph (A) of Article XX.

(H) "Person" and "Persons" include individuals, partnerships, associations and/or corporations, both public and private.

(I) PONDAGE means facilities consisting of a reservoir or reservoirs created by a dam or dams and controlling works and other necessary equipment, constructed and installed for the purpose of regulating the flow of the Truckee River at ICELAND GAGE and of storing water of said River and/or its tributaries.

(J) PRIVATELY OWNED STORED WATER means water (not including water impounded in SUPPLEMENTAL RESERVOIR after its release into the Truckee River or its tributaries, or water stored in and/or now contributing to the water of Lake Tahoe, after its release into said River) impounded by any person under such conditions that the right to the use of such water shall be vested in such person, his successors or assigns.

(K) REDUCED FLORISTON RATES means rates of flow of water in the Truckee River, measured at the ICELAND GAGE, effective and in force during the period commencing November 1 and ending the next following March 31 of each YEAR, determined as follows, viz.:

(1) 350 cubic feet per second whenever the elevation of the water surface of Lake Tahoe is below 6226.0 feet above sea level and not below 6225.25 feet above sea level, and

(2) 300 cubic feet per second whenever the water surface elevation of Lake Tahoe is below 6225.25 feet above sea level.

(L) SUPPLEMENTAL RESERVOIR means facilities on the Little Truckee River consisting of a storage reservoir having a capacity of not less than 40,000 acre feet, for the storage and control of water and the release thereof into the Little Truckee River.

(M) (1) SUPPLEMENTAL STORAGE WATER means the first 25,000 acre feet of water (or, if, a lesser quantity be diverted and stored, then such lesser quantity) diverted and stored in SUPPLEMENTAL RESERVOIR during any year commencing October 1 and ending September 30 next following under the provisions of Paragraph (A) of Article IV of this agreement.

(M) (2) ADDITIONAL SUPPLEMENTAL STORAGE WATER means all water diverted and stored in SUPPLEMENTAL RESERVOIR in excess of SUPPLEMENTAL STORAGE WATER.

(N) TRUCKEE CANAL WATER means that part of the flow of the Truckee River, to the extent of 1500, cubic feet per second, decreed to the United States by the

TRUCKEE RIVER FINAL DECREE for diversion into the Truckee Canal.

(O) TRUCKEE RIVER FINAL DECREE means the final decree which by Article X hereof the parties agree may be entered in said cause pending in the District Court of the United States in and for the District of Nevada, entitled "The United States of America, plaintiff, V. Orr Water Ditch Company, et al, defendants, in Equity No. A-3."

(P) YEAR means a period of twelve consecutive months beginning with the date first mentioned in each instance. The word "year" when not capitalized shall refer to the calendar year.

* * *

ARTICLE VII. Allocation of DIVERTED FLOW of Truckee River after OPERATIVE DATE OF THIS AGREEMENT

(A) Allocation.

All of the parties hereto agree that from and after the OPERATIVE DATE OF THIS AGREEMENT the rights to the use at all times of DIVERTED FLOW of the Truckee River shall, for the purposes of this agreement, be allocated:

(1) To the Irrigation District, for use upon the Carson and Truckee Divisions of the Newlands Reclamation Project, and (to the extent provided in subparagraph (1) of Paragraph (A) of Article V of this agreement) to the Power Company, and their respective successors in interest, on the one hand, and

(2) To the Conservation District and to the owners (as defined in the TRUCKEE RIVER FINAL DECREE), and their successors in interest, of rights to

use water diverted from the Truckee River for use upon lands entitled to water under the provisions of the TRUCKEE RIVER FINAL DECREE, for irrigation, domestic and stock watering purposes and located between ICELAND GAGE and Derby Dam (including use upon the additional lands referred to in Article VIII of this agreement), subject, however, to the rights of the Power Company for MUNICIPAL AND DOMESTIC USES as provided in subdivision (b) of subparagraph (1) of Paragraph (A) of Article V of this Agreement, on the other hand, in the following manner, to wit: The right to the use of thirty-one (31) percent of such DIVERTED FLOW is hereby allocated to the persons and for the uses provided in subparagraph (1) of this Paragraph (A), and the rights to the use of the remaining sixty-nine (69) per cent of such DIVERTED FLOW is hereby allocated to the persons and for the uses provided in subparagraph (2) of this Paragraph (A); provided, always, that at any time when the right to use any portion of the sixty-nine (69) per cent of DIVERTED FLOW is not being fully exercised for the uses provided in subparagraph (2) of this paragraph (A), and by reason of such fact there shall exist a flow of water available for diversion at Derby Dam in excess of the amount to which the Irrigation District is entitled at such time under the provisions of the TRUCKEE RIVER FINAL DECREE and/or this agreement, the Irrigation District shall have the right to divert and use such excess for its own purposes.

The Conservation District shall be entitled (subject to subdivision (b) of subparagraph (1) of Paragraph (A) of Article V hereof) to the use of all water included in said sixty-nine (69) per cent of DIVERTED FLOW referred to in subparagraph (2) of Paragraph (A) of this Article, which is in excess of the NATURAL FLOW therein.

The waters flowing in the Truckee River (other than NATURAL FLOW) to which the Conservation District shall be entitled under the terms of this agreement shall be divided and allocated by it for the benefit of the lands within the Conservation District in the manner provided by law and this agreement.

(B) Priorities.

Whenever, in order to carry out and effect the allocation provided for in Paragraph (A) of this Article VII, it shall be necessary that any limitation be made upon the quantity of water which any of the parties may divert, such limitation shall be made upon the quantities of water which the parties of the fifth part may divert and in the order of the priorities of said parties of the fifth part as such priorities are defined in the TRUCKEE RIVER FINAL DECREE, and in such case a quantity of water equal to the amount of such limitation shall accrue and be applied to the uses of the Irrigation District and the Power Company, as provided in subparagraph (1) of Paragraph (A) of this Article VII.

• • •

IN WITNESS WHEREOF; the parties hereto have executed this agreement, the day and year first above written.

UNITED STATES OF AMERICA,

By .....

Party of the First Part.

TRUCKEE-CARSON IRRIGATION DISTRICT,

By .....

By .....

Party of the Second Part.

WASHOE COUNTY WATER CONSERVATION DISTRICT,

By .....

By .....

Party of the Third Part.

SIERRA PACIFIC POWER COMPANY,

By .....

By .....

Party of the Fourth Part.

Appendix G: Notice of Operating Criteria and Procedures, 38 Federal Register No. 47, p. 6697 *et seq.*, March 12, 1973.

NOTICES

Office of the Secretary

NEWLANDS RECLAMATION PROJECT, NEV.

Operating Criteria and Procedures;

Truckee and Carson Rivers

The following Judgment and Order and accompanying Operating Criteria and Procedures for Coordinated Operation and Control of the Truckee and Carson Rivers for Service to Newlands Project (Nevada), are published pursuant to order of the U.S. district court in the case entitled "Pyramid Lake Paiute Tribe of Indians v. Rogers C. B. Morton, Secretary of the Interior" U.S.D.C., D.C., Civil Action No. 2506-70. The explanatory Memorandum which was issued with the Judgment and Order is also published.

Dated; March 2, 1973.

John C. Whitaker,
Acting Secretary of the Interior.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

[Civil Action No. 2506-70]

Pyramid Lake Paiute Tribe of Indians, Plaintiff

v.

Rogers C. B. Morton, Secretary of the Interior, Defendant

MEMORANDUM

During the pendency of this litigation, the Secretary placed into effect Operating Criteria to govern the water year ending October 31, 1973, it being understood that these criteria would be subject to possible revision and change based on the deteminations of the Court. The Court has today entered a Judgment and Order approving different Operating Criteria which the Court finds more consistent with the Secretary's legal and fiduciary obligations to the Tribe. The parties are in accord with respect to many aspects of the approved Operating Criteria, but the Court has had to resolve controversies over other substantial portions.

This Judgement and Order is entered midway in the water year. It will not be practical to implement fully all of its provisions by October 31, 1973. Accordingly, the Court has been obliged to recognize the need for certain interim adjudgments. [sic] It has directed that the approved Operating Criteria shall be placed in full force and effect commencing with the next water year, November 1, 1973.

For the current water year the approved Operating Criteria will be generally applicable and the Secretary must take immediate steps to put them into effect. Since some aspects will require time to implement, the Court is

authorizing the Secretary to divert more water to aid transition.

In selecting 350,000 acre-feet for diversion during the present water year, rather than the 288,120 acre-feet specified for the following water year, the Court has acceded to the Secretary's representations that this amount will enable a more gradual transition and in view of current weather conditions will not substantially deprive the Tribe of water for Pyramid Lake. The Tribe has not accepted the figure of 350,000 acre-feet, but did agree that more diversion than 288,129 acre-feet should be permitted for the current year. The Judgment and Order also makes certain additional changes in the approved criteria for the immediate period ahead in recognition of this larger diversion.

The Court's role in these proceedings has focused on the Operating Criteria in effect since November 1, 1971. The proof showed, however, that the Secretary has followed the practice of more or less renewing similar or identical criteria from year-to-year. As these proceedings have gone forward, the Secretary has indicated an increasing willingness to take actions in aid of Pyramid Lake. While some adjustments in Operating Criteria may be necessary after October 31, 1974, to accommodate changing conditions, there is no reason to believe from the record before the Court that the general standards established by the Court's Judgment and Order should otherwise change. The Secretary's fiduciary obligations will not alter and his continuing duty actively to supervise and upgrade the Newlands Project and to provide maximum water for Pyramid Lake will not change. It is to be hoped that new litigation can be avoided by the Secretary's assiduous attention to his responsibilities in this regard.

Gerhard A. Gesell, U.S. District Judge.

February 20, 1973.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Civil Action No. 2506-70]

Pyramid Lake Paiute Tribe of Indians,
Plaintiff

v.

Rogers C. B. Morton, Secretary of the Interior,
Defendant

JUDGMENT AND ORDER

The Court having filed its Memorandum Opinion of November 8, 1972, after giving full opportunity to the parties to fashion appropriate relief and having considered the proposed relief of each party, it is hereby

Ordered, adjudged and decreed that:

(1) The Secretary's Operating Criteria setting forth procedures for coordinating operation and control of the Truckee and Carson Rivers to provide service to the Newlands Project now in effect are arbitrary and an abuse of his discretion.

(2) The Court declares that Operating Criteria in the form attached to this Judgment and Order are necessary and appropriate to fulfill the Secretary's fiduciary and legal obligations to the Tribe.

(3) The Secretary shall immediately publish this Judgment and Order, and publish and implement and enforce the attached Operating Criteria for the water year commencing November 1, 1973, and for the current water year ending October 31, 1973, provided, however, for the current water year only, he may divert up to 350,000 acre-feet for the twelve months ending October 31, 1973, and he shall discard the detailed provisions of Sections A and B and in lieu thereof comply with the following requirements:

A(1) 50,000 acre-feet of water presently stored in Stampede Reservoir will be credited to the Truckee-Carson Irrigation District to be used by it in the event the water stored in Lahontan Reservoir shall fall below 80,000 acre-feet and it appears that it is necessary to draw upon this water to meet the needs within the allowable maximum total diversion of the Truckee-Carson Irrigation District for this water year.

(2) Subject to the provisions of Section A(1), diversions from the Truckee River for the Truckee-Carson Irrigation District shall be limited to the needs of the Truckee division.

(3) Maximum storage of water in Stampede Reservoir shall be required. Releases shall be limited insofar as possible consistent with existing decrees, flood control requirements and for the purposes of assisting fishery experiments as approved by the Secretary after consultation with the Tribe and the Bureau of Sport Fisheries and Wildlife.

(4) Nothing in this Judgment and Order shall constitute an interpretation or modification of either the Alpine or Orr Water Ditch decrees, nor shall it be deemed to affect the rights of any person under either of such decrees, so long as they remain in effect.

(5) Nothing in the Judgment and Order shall be deemed to prevent any change in the Operating Criteria that may be agreed between the parties, in writing, or ordered by the Court, after notice.

Gerhard A. Gesell,
U.S. District Judge.

February 20,1973.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Civil Action No. 2506-70]

Pyramid Lake Paiute Tribe of Indians,
Plaintiff

v.

Rogers C. B. Morton, Secretary of the
Interior, Defendant

OPERATING CRITERIA AND PROCEDURES FOR COORDINATED OPERATION AND CONTROL OF THE TRUCKEE AND CARSON RIVERS FOR SERVICE TO NEWLANDS PROJECT

The water supply diversions to the Truckee-Carson Irrigation District from both the Truckee and Carson Rivers shall be limited to the amount needed for agricultural purposes, not exceeding 288,129 acre-feet, if available, for the twelve months ending October 31,1974. The water supply diversions shall be measured at the gauging station below Lahontan Dam and at diversion points along the Truckee Canal.

All use of water for power generation shall be incidental to either agricultural use or precautionary drawdown or spill.

In satisfying the diversion for agricultural purposes, maximum use will be made of Carson River water and diversions through the Truckee Canal will be minimized.

Stampede Reservoir shall be operated by the United States to provide flood control, fish and wildlife, and recreation benefits and to store water for possible agricultural use by the Truckee-Carson Irrigation District. The operation of Stampede Reservoir will be coordinated with the operation of Lake Tahoe, Prosser Creek Reservoir, and Boca Reservoir to avoid infringing

upon the Floristan Rates or water rights established by existing degrees [sic] and agreements.

In all of the operations, Truckee Canal will be operated to the maximum extent practical with the objective of maintaining minimum terminal flow to Lahontan Reservoir or Carson River during all periods except when criteria herein specifically permits such deliveries. In order to minimize the rates of fluctuation in the Truckee River below Derby Dam the change of flow in Truckee Canal within any 24-hour period shall not exceed 50 cubic feet per second or 20 percent of the flow in the Truckee River below Derby, whichever is greater.

During periods of spill or precautionary drawdown of Lahontan Reservoir, the District will be charged only with the predetermined schedule of irrigation releases to be passed at the gauging station below Lahontan Reservoir plus measured diversions from the Truckee Canal and Rock Dam Ditch.

The operation of Stampede Reservoir, Derby Diversion Dam, Truckee Canal, and Lahontan Reservoir will be conducted in accordance with the following criteria in order to minimize diversions from the Truckee River through the Truckee Canal.

SECTION A

Truckee Diversion Criteria

Subject to conditions specified in Section B (Storage Credit at Stampede), the diversions of water from the Truckee River into and through the Truckee Canal will be governed by the following criteria:

(1) If available, sufficient water will be diverted into Truckee Canal to meet direct agricultural requirements along the Truckee Canal.

(2) Diversions through the Truckee Canal into Lahontan Reservoir will be made in accordance with the following tabulation:

Operating month	If accumulated precipitation from Oct. 1 to date at Tahoe City, Calif. is:		Continue Truckee Canal Diversion to Lahontan Reservoir if storage is less than upper limit			
			Lower limit[1]		Upper limit	
November-March		Inches	Elev.	Ac.Ft.	Elev.	Ac.Ft.
November 1	Less than	5.00	4123.3	60,000	4124.3	63,000
	Equal or Greater than	5.00	4103.6	20,000	4105.8	23,000
December 1	Less than	5.00	4129.3	80,000	4130.1	83,000
	Between	5.00 & 10.70	4123.3	60,000	4124.3	63,000
	Greater than	10.70	4115.4	40,000	4116.8	43,000
January 1	Less than	10.70	4138.5	120,000	4139.1	123,000
	Between	10.70 & 16.80	4131.8	90,000	4132.6	93,000
	Greater than	16.80	4123.3	60,000	4124.3	63,000
February 1	Less than	16.80	4145.8	160,000	4146.3	163,000
	Between	16.80 & 22.10	4138.5	120,000	4139.1	123,000
	Greater than	22.10	4129.3	80,000	4130.1	83,000
March 1	Less than	22.10	4151.8	200,000	4152.2	203,000
	Between	22.10 & 26.10	4144.1	150,000	4144.6	153,000
	Greater than	26.10	4134.2	100,000	4134.9	103,000

April-October	If forecasted runoff plus existing storage on April 1 is:	Ac.Ft.	Elev.	Ac.Ft.	Elev.	Ac.Ft.
April 1	Greater than	350,000	No diversion to Lahontan thru October			
	Between	250,000 & 350,000	4154.3	220,000	4154.7	223,000
	Less than	250,000	4159.8	270,000	4160.1	273,000
May 1	Between	250,000 & 350,000	4151.8	200,000	4152.2	203,000
	Less than	250,000	4162.6	300,000	4162.8	303,000
June 1	Between	250,000 & 350,000	4144.1	150,000	4144.6	153,000
	Less than	250,000	4157.7	250,000	4158.1	253,000
July 1	Between	250,000 & 350,000	4134.2	100,000	4134.9	103,000
	Less than	250,000	4145.8	160,000	4146.3	163,000
August 1	Between	250,000 & 350,000	4129.3	80,000	4130.1	83,000
	Less than	250,000	4131.8	90,000	4132.6	93,000
Sept. 1	Less than	350,000	4119.7	50,000	4120.8	53,000
October 1	Less than	350,000	4115.4	40,000	4116.8	43,000

[1]Truckee Canal Diversion to Lahontan Reservoir should be started only when storage recedes below lower limit.

SECTION B

Storage Credit at Stampede

As a means of minimizing the diversions of Truckee River water for use on the Carson Division of the Truckee-Carson Irrigation District or for storage in Lahontan Reservoir and at the same time ensuring that the District shall receive exactly the same total amount of water for its beneficial use as otherwise, the following modifications shall be applied to the criteria in Section A (Truckee Diversion Criteria):

(1) The storage levels in Lahontan Reservoir specified as limits for starting and stopping diversions of water for storage in Lahontan or use on the Carson Division shall be converted to acre-feet and applied to the sum of water in storage at Lahontan Reservoir and water in Stampede Reservoir credited to the Truckee-Carson Irrigation District using the most up-to-date area-capacity curve for each reservoir.

(2) The combined storage facilities on the upper Truckee River will be operated in a manner consistent with the applicable decrees and so as to maintain the Floristan Rates with the objective of maximizing the accumulation of storage in Stampede Reservoir.

(3) Whenever there is an adequate amount of uncommitted water in Stampede Reservoir the Truckee-Carson Irrigation District shall forego the diversion of water into the Truckee Canal for storage in Lahontan Reservoir or for use on the Carson Division and shall accept credit in Stampede Reservoir for the amount of water it otherwise would have diverted. For the purposes of this subsection, an adequate amount of uncommitted water (consisting of not less than 50,000 acre-feet) will be deemed to have accumulated in Stampede Reservoir no later than February 1, 1974.

(4) The sum of the amount of water stored in Lahontan Reservoir plus the amount of water stored in Stampede Reservoir and credited to the Truckee-Carson Irrigation District shall not be allowed to exceed the storage capacity of Lahontan Reservoir below elevation 4163.67 feet above mean sea level (317,300 acre-feet), and this limit shall be preserved, if necessary, by the reduction of credit in Stampede Reservoir. When the amount of water credited to the Truckee-Carson Irrigation District is so reduced, the amount of that reduction shall be credited for the purpose of maintaining the minimum rates of flow below Derby Dam provided in Section B(7) of these Operating Criteria and Procedures.

(5) Whenever the water surface elevation of Lahontan Reservoir is at or below elevation 4129.28 feet (80,000 acre-feet) above mean sea level during the irrigation season, water will be released from Stampede Reservoir to be diverted into and through the Truckee Canal for agricultural use by the Truckee-Carson Irrigation District in either or both the Truckee and Carson Divisions. The total amount of the release shall be limited to the lesser of the amount credited to the Truckee-Carson Irrigation District or the amount needed to supplement the 80,000 acre-feet of water in Lahontan Reservoir to meet the remaining seasonal agricultural requirements of the Truckee-Carson Irrigation District.

(6) From February 1, 1974, the District will be credited with an initial 50,000 acre-feet of water in Stampede. In addition to this amount, the District will be credited with the accumulated storage in excess of 5915.0 feet above mean sea level (127,600 acre-feet) in accordance with B(3) above.

(7) Insofar as possible consistent with existing decrees and with maintaining the Floristan Rates and with

Operating Criteria and Procedures Sections B(1) through B(6), Stampede Reservoir (as well as the other storage facilities on the upper Truckee River) shall be operated with the objective of maintaining the following minimum rates of flow for fish, wildlife and recreation purposes in the Truckee River below Derby Dam measured at the Nixon gauge:

March 1-May 15	600 cubic feet per second
May 16-September 15	300 cubic feet per second
September 16-February 28	150 cubic feet per second

(8) At the conclusion of the water year, October 31, 1973, the District shall retain as minimum carry-over credit in Stampede Reservoir for the 1974 water year the quantity of Truckee River water that it would have been able to divert to Lahontan Reservoir in the absence of its storage credit at Stampede. In addition, the Secretary of the Interior, in consultation with the Pyramid Lake Paiute Tribe of Indians and the Bureau of Sport Fisheries and Wildlife with respect to the requirements of the Pyramid Lake fishery, will determine: (1) the portion of the remaining storage in Stampede Lake allocated for releases to Pyramid Lake, and (2) the portion of the remaining storage in Stampede Reservoir to be allocated to the District as additional carry-over storage credit for the 1974 water year.

(9) Nothing in sections B(1) through B(8) of these Operating Criteria and Procedures shall in any way infringe on or interfere with the flood control function of Stampede Reservoir.

SECTION C

As a means of insuring that the amount of water diverted is limited to that prescribed for beneficial agricultural use, the Truckee-Carson Irrigation District shall:

(1) Deliver water only to lands for which the District has in advance established to the satisfaction of the Secretary or his designee that a current valid water right exists.

(2) Establish a single water operations center which will coordinate all orders for delivery of water to individual turnouts and which then will dispatch flows in the distribution systems so as to meet the water orders with minimum spill from the distribution system.

(3) Permit only authorized District employees to open and close individual turnouts and operate the distribution system facilities.

(4) Establish and operate sufficient stations for the measurement of all surface waters flowing out of the Truckee, North Carson, and South Carson Divisions.

(5) Initiate immediately a program for improving the measurement of the amounts of water delivered to individual turnouts. The program shall include the installation of measuring devices on at least 10 percent of the total turnouts in 1973; the program shall concentrate first on the combinations of large users and currently poor measurements; and the installed devices must be approved by the U. S. Geological Survey and the Bureau of Reclamation.

(6) Submit to the Project Office of the Bureau of Reclamation a monthly report by the 15th of the following month for each of the three divisions showing the total water delivery in acre-feet and the maximum, minimum and mean daily outflow in cubic feet per second. Reports showing the amount of water in acre-feet delivered to each farm each month during the water year shall be made at least twice during the calendar year. These reports shall be circulated to the Tribe and the members

of the Truckee-Carson Operating Criteria and Procedures Committee.

(7) By June 30, 1973, establish a system, to become effective November 1, 1973, for charging water users for the quantity of water delivered to their turnouts. The system shall be designed: (a) to provide a reasonable financial incentive for economical and efficient use of water; and (b) to produce revenue against the District's operation and maintenance expenses and to assist the discharge of its debt to the United States.

SECTION D

(1) Article 32 of the December 18, 1926, contract between the United States and the District will be invoked by the Secretary for substantial violations of these Operating Criteria and Procedures and the Secretary reserves all other rights and options to enforce these criteria.

(2) If the Secretary determines that waste has occurred through negligence or inattention, after written notice the amount of such waste shall be deducted from the District's allowable maximum total diversion.

(3) The District shall not deliver water to users who do not comply with all of the terms and provisions of these Operating Criteria and Procedures. Such deliveries shall not resume without the prior approval of the Secretary or his designee.

(4) The Secretary shall not approve any applications for transfers of water rights within the Newlands Project pursuant to 43 U.S.C. § 439 unless he finds that the District is in compliance with all of the terms and provisions of these Operating Criteria and Procedures and that the applicants for such transfers are in compliance with these Operating Criteria and Procedures and with

the applicable decrees. Transfers of water rights shall be restricted to the extent that there shall be no enlarged consumptive use of water within the lands of the Newlands Project.

(5) All of the water delivery operations of the Truckee-Carson Irrigation District shall be monitored closely by the Bureau of Reclamation. Any and all violations of the terms and provisions of these Operating Criteria and Procedures shall be reported immediately by the District to the Project Office of the Bureau of Reclamation.

[F.R. Doc. 73-4612 Filed 3-8-73; 8:45 a.m.]

Appendix H: Memorandum, Associate Solicitor, Indian Affairs, to Assistant to the Secretary for Indian Affairs (Recommending appeal of Tribe v. Morton decision), February 26, 1973.

United States Department of the Interior
Office of the Solicitor
Washington, D.C. 20240

February 26, 1973

Memorandum

To: Assistant to the Secretary for Indian Affairs

From: Associate Solicitor, Indian Affairs

Subject: Pyramid Lake

On February 20, 1973, the United States District Court for the District of Columbia, in a suit filed by the Tribe against the Secretary, ordered the Secretary to immediately publish and enforce new criteria for the operation and control of the Truckee and Carson Rivers as they serve the Newlands Reclamation Project in Nevada. The court-ordered criteria and procedures are highly beneficial to the Tribe and are in substantial agreement with those recommended by the Tribe.

The Department's position throughout this litigation, with which I am in full agreement, is that the Court lacks jurisdiction to compel the Secretary to issue operating criteria, in view of the fact that indispensable parties (non-Indian waterusers) are not and cannot be joined as parties to this action and that the U.S. District Court for the District of Nevada has continuing jurisdiction, in two pending suits, over the waters of both the Truckee and Carson Rivers and all of the necessary parties.

I have recommended to the Solicitor that the Department take the following actions in connection with the recent Court order:

1. Immediately publish the Court order and operating criteria in the *Federal Register,* preceded by a short statement, signed by the Secretary, that the operating criteria are being put into effect in accordance with the Court order.

2. Immediately notify the Irrigation District that the operating criteria have been published and will be strictly enforced. The purpose of this letter is to provide at the earliest possible moment a breach by the Irrigation District, in order that the scene of the litigation can be moved to Reno, which is the only court with jurisdiction to finally resolve the critical issues concerning Indian/non-Indian water rights.

3. Advise Justice that we recommend an appeal from the Court order on jurisdictional grounds but that we do not believe that Justice should seek a stay pending appeal, since such action would result in a total absence of any operating criteria. Under such circumstances, the Department would have absolutely no control over the appropriation of water, to the detriment of the Indians and the unjustified benefit to the Irrigation District. The letter to Justice would also seek a commitment to obtain judicial clarification of existing conflicting decrees of the District Court in Nevada and to strictly enforce the provisions of the Court-ordered operating criteria. In this latter connection it is my opinion that an appeal to the Court of Appeals for the District of Columbia has absolutely no value since nothing that this Court can say or do will bind the parties in Nevada. The real issues in this case are the meaning of two existing water decrees issued by the District Court in Nevada, the rights and obligations of

the parties under the 1926 contract between the Secretary and the Irrigation District and the extent to which the Secretary is committed administratively to act to deliver water to Pyramid Lake in the absence of a decreed right on the part of the Tribe. This right is presently being asserted in the Supreme Court in the case of *United States v. Nevada and California.* The Supreme Court will hear argument in March on whether to allow the filing of this original action.

/s/ William A. Gershuny
William A. Gershuny

Copy to:
Secretary's Files
Solicitor's Files
WAGershuny
HARanquist
DIA Reading Files

WAGershuny:tec 2/26/73

Appendix I: Letter, Deputy Solicitor, Department of Interior, to Assistant Attorney General, Department of Justice (Recommending appeal of Tribe v. Morton decision), March 7, 1973.

United States Department of the Interior
Office of the Solicitor
Washington, D.C. 20240

In Reply Refer To:

Honorable Kent Frizzell
Assistant Attorney General
Land and Natural Resources Division
Department of Justice
Washington, D. C. 20530

Dear Mr. Frizzell:

In connection with the case of *Pyramid Lake Paiute Tribe of Indians v. Morton*, Civil Action No. 2506-70, in the United States District Court for the District of Columbia, the Department has published the court's judgment and order of February 20, 1973, and the accompanying operating criteria in the *Federal Register*.

The Department recommends that an appeal be taken from this order for the jurisdictional reasons asserted throughout the case. Further, the court's statement that its order does not constitute an interpretation or modification of either the *Alpine* or *Orr Water Ditch* decrees flies in the face of the express provisions in the order applying the *Alpine* decree. We do not favor seeking a stay, however, for the reason that a stay would leave the Department without presently applicable operating criteria and procedures for the Newlands Project.

As you know, the Department has taken the position throughout this litigation that certain provisions of the *Alpine* and *Orr Water Ditch* decrees are ambiguous and mutually inconsistent. We are still of this opinion. By

letter to you of April 5, 1972, we asked that appropriate action be taken immediately to clarify any ambiguous provisions of the decrees and secure their strict enforcement. To date, no such action has been taken. We continue of the view that clarification and enforcement of the decrees is essential to any meaningful solution to this problem, and again encourage you to initiate action for this purpose.

The Department is required by the order of the court to strictly enforce the operating criteria adopted by it. Close monitoring of operations of the irrigation district therefore will be required. Violations of operating criteria terms by the irrigation district which cannot be remedied through administrative procedures will be referred to the Department of Justice with a request for enforcement action in the United States District Court for Nevada.

Sincerely yours,

Raymond C. Coulter
Deputy Solicitor

NOTE: This letter was cleared by Robert J. Hitt before it was signed by the Deputy Solicitor Raymond C. Coulter.

cc: Assistant Secretary—Land and
Water Resources
Commissioner of Indian Affairs
Commissioner of Reclamation
Assoc. Sol., Indian Affairs
Mr. Robison
W&PR Division Files
Docket and Records Sec.
Reading File—W&PR
SOL:RGRobison, Jr./lb 3/6/73

Appendix J: Letter, Assistant Attorney General, Department of Justice, to Solicitor, Department of Interior (Decision not to appeal), April 30, 1973.

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

April 30, 1973

ERD
90-2-4-171

Solicitor
Department of the Interior
Washington, D. C.

Dear Sir:

Re: Pyramid Lake Paiute Tribe of Indians v. Rogers C. B. Morton, Secretary of the Interior, Civil No. 2506-70, D. D.C.

This Department has decided not to file an appeal in the above-entitled case.

Sincerely,
Assistant Attorney General
Land and Natural Resources Division
By: /s/ Eva R. Datz
Eva R. Datz
Attorney, Appellate Section

cc: Commissioner of Reclamation
Associate Solicitor, Indian Affairs
Regional Solicitor, Sacramento
Regional Director, Sacramento

5-7-73—Office of Solicitor,
Washington, D.C.

Appendix K: Letter, Secretary of the Interior to Truckee-Carson Irrigation District Board of Directors (Notice of Contract Termination), September 14, 1973.

United States Department of the Interior
Office of the Secretary
Washington, D.C. 20240

Sep 14, 1973

Gentlemen:

This letter constitutes notice that the contract of December 18, 1926, will be terminated as of October 31, 1974.

That contract transferred to your District the management of the irrigation works of the Carson and Truckee divisions of the Newlands Reclamation Project. The notice of termination is issued pursuant to Article 32 of that contract, which requires that you be given one year's prior written notice of termination.

The immediate reason for this action is the repeated violations by the District of this Department's Operating Criteria and Procedures for the Newlands Reclamation Project. These criteria, as you know, have been promulgated since 1967 (43 C.F.R. Part 418); the latest criteria were issued pursuant to court order in *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252 (D.D.C. 1972), and published in 38 Fed. Reg. No. 47, p. 6697 (March 12, 1973). You were, of course, given specific notice and copies of the latest criteria. The criteria specifically provide that:

> "D(1) Article 32 of the December 18, 1926, contract between the United States and the District will be invoked by the Secretary for substantial violations of these Operating Criteria and Procedures. . . ."

In addition, Article 7 of the 1926 contract requires that the District fully comply with "the rules and regulations of the Secretary now in force or hereafter promulgated."

Despite repeated expressions of concern by officials of this Department, the District has persisted in violating these criteria in a number of respects.

Between June 8 and June 16, 1973, the District diverted substantial quantities of Truckee River water for storage in Lahontan Reservoir in violation of the criteria. The District was formally advised by letter from the Regional Director of the Bureau of Reclamation on June 8 that any such diversions were prohibited by the criteria and would be in violation thereof. Thereafter, you were advised by the Commissioner of Reclamation and the Solicitor that if the District persisted in these unauthorized diversions, the Department had no choice but to give notice of cancellation of the 1926 Contract. Following further discussions with the Commissioner and the Solicitor, an agreement was reached whereby you discontinued the unauthorized June diversions. Because of this agreement, this Department did not then terminate the contract or institute litigation to arrest those diversions.

However, on September 10, 1973, the District again commenced diversions of the Truckee River for storage in Lahontan Reservoir in excess of the needs of the Truckee Division of the project. As with the June diversions, these diversions are plainly prohibited by the operating criteria unless (which is not the case) Lahontan Reservoir is below 80,000 acre feet. These diversions have continued to the present time, although the Bureau of Reclamation's Regional Director has again furnished the District with official notice that its action is in violation of the operating criteria.

Officials of this Department have been in frequent communication with the District concerning the regulations

and violations that have occurred. On April 5 and 13, 1973, the Regional Director of the Bureau of Reclamation for the Mid-Pacific Region directed letters to the District describing the actions which the Bureau intended to take to assist it in complying with the new operating criteria. On May 22, 1973, the Bureau's Regional Director submitted a six-page report on the status of compliance with the new criteria. This report, in substance, indicated that no response had been received from the District as to any of the previous correspondence on this matter and, additionally, pursuant to subsection D(4) of the Operating Criteria and Procedures, we were forced to suspend further approval of water rights transfers because of the District's failure to comply with the Operating Criteria and Procedures. The report, a copy of which was furnished to the District, went on to list in detail your activities and the lack thereof relative to the required criteria.

Following our agreement subsequent to the June diversions, the Solicitor of this Department sent you a letter on July 31, 1973, concerning information that violations of the criteria were continuing, which he enumerated. Our information indicates that most if not all of these violations have continued. The Solicitor's July 31 letter closed with this paragraph:

> "It is hoped that the District will promptly take such measures as are necessary to bring itself in compliance with the Operating Criteria, so as to make it unnecessary for the Secretary to resort to Article 32 or such other remedies as might be available to him."

On August 8, 1973, the Regional Director forwarded to the Commissioner of Reclamation his second report on the status of the District's compliance with the operating criteria. A copy of this report was also furnished to you. The report once again recited continued violations of the

criteria. On August 9, 1973, the Commissioner of Reclamation, the Bureau's Acting Regional Director for the Mid-Pacific Region, and the Department's Sacramento Regional Solicitor personally traveled to Fallon, Nevada, for a meeting with District officials to discuss this critical matter. Following that meeting, the District sent to the Commissioner a letter dated August 21, 1973, describing certain activities which it believed might be considered partial compliance with the criteria and offered various explanations as to why certain other actions required by the operating criteria would not or could not be taken. But subsequent to the August 9 meeting and August 21 letter, the District again commenced the diversions for storage in Lahontan Reservoir.

This course of action constitutes continued and willful violation of this Department's Operating Criteria and Procedures and requires termination of the 1926 contract. During the next thirteen months, as required by the one-year notice provision of the contract, the District will presumably remain in control of project facilities, including Derby Diversion Dam. I would take this opportunity to emphasize, however, that this Department will expect scrupulous compliance with its Operating Criteria and Procedures for the next water year, including of course the water use ceiling of 288,000 acre feet. This letter will notify you that any water diverted, used or stored in violation of the criteria will be deducted from water allowed to the District in subsequent years after the United States assumes control of Derby Dam and other project facilities. To illustrate: If the District were to divert and use a total of 388,000 acre feet of water during the next water year, including over 100,000 acre feet of Truckee River water, the United States will deduct 100,000 acre feet from future deliveries of Truckee River water to which the District would otherwise be allowed under the Operating Criteria and Procedures.

In addition, the amount by which the District exceeds the 350,000 acre feet ceiling during the present water year will also be deducted from future deliveries which it would otherwise be allowed. From our present information it appears that the District's water use is now about twelve percent above schedule and will very likely exceed the ceiling.

You will be subsequently notified of detailed procedures to be followed respecting termination of this contract.

Sincerely yours,

(Sgd) Rogers C. B. Morton
Secretary of the Interior

Board of Directors
Truckee-Carson Irrigation District
152 North Maine Street
Fallon, Nevada 89406

Appendix L: Complaint, Truckee-Carson Irrigation District v. Secretary of the Department of the Interior; Civ. No. R-74-34-BRT, March 18,1974.

E. J. Skeen, Esq.
Skeen and Skeen
536 East 4th South
Salt Lake City, Utah 84102
Telephone: (801) 363-8202

James W. Johnson, Jr., Esq.
Attorney at Law
10 State Street
Reno, Nevada 89501
Telephone: (702) 323-8616

Frederick G. Girard, Esq.
Kronick, Moskovitz, Tiedemann & Girard
A Professional Corporation
555 Capitol Mall, Suite 855
Sacramento, California 95814
Telephone: (916) 444-8920

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-74-34-BRT
Truckee-Carson Irrigation District,
Plaintiff,
vs.
Secretary of Interior,
Defendant.
[Filed Mar. 18, 1974]
[Exhibits omitted]

COMPLAINT

I

This is an action for a declaratory judgment pursuant to 28 U.S.C. 2201; 2202, and for a preliminary injunction, pursuant to Rule 65 of the Rules of Civil Procedure. A declaratory judgment is sought for the purpose of determining a question of actual controversy between the parties, as hereinafter more fully appears. The preliminary injunction is sought so that the status quo will be preserved until the disputed issues are determined.

II

The jurisdiction of this Court is invoked pursuant to the provision of 28 U.S.C. 1331(a), as the amount in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and arises under the laws of the United States, as hereinafter more fully appears. The jurisdiction of this court is also invoked pursuant to the provisions of 5 U.S.C. 701-706, inclusive, in that plaintiff Truckee-Carson Irrigation District is suffering legal wrong because of agency action, or is adversely affected or aggrieved by agency action within the meaning of a relevant statute. This action is properly brought in this court against the defendant Secretary of Interior pursuant to 28 U.S.C. 1391(e).

III

Plaintiff Truckee-Carson Irrigation District is an irrigation district duly organized and existing under the laws of the State of Nevada, with its principal place of business at Fallon, Nevada. The defendant is the Secretary of

Interior who is the federal officer who directs the operations and conduct of the United States Department of Interior, and its Bureau of Reclamation.

IV

On July 2, 1902, the United States, acting by the Secretary of Interior and under the authority of the Reclamation Act (Act of June 17, 1902, 32 Stat. 388) withdrew from public entry a large acreage of public lands in the State of Nevada, and on March 14, 1903, the Secretary of Interior approved the construction of the Newlands Reclamation Project, and construction commenced. The principal works of the project consist of a dam at the outlet of Lake Tahoe, the Derby Diversion Dam in the Truckee River, the Truckee Canal which carries water from the Truckee River to Lahontan Reservoir (a distance of approximately 32.5 miles), the Lahontan Dam and Reservoir (with a present capacity of 294,000 acre-feet), which stores water from both the Truckee and Carson Rivers, a power plant at Lahontan, many miles of drains for the drainage of project lands, and approximately 431 miles of canals, ditches and laterals which convey the waters of the Truckee and Carson Rivers to the lands within the project boundaries, where it is used, principally for irrigation. At the present time, there are approximately 70,000 acres of land within the project boundaries which are irrigated by means of the above-described project works.

V

That on July 2, 1902, when the United States withdrew from public entry said public lands for said Newlands Project as authorized by said Reclamation Act, it acquired a right to divert water from the Truckee River for use on those lands with a priority of July 2, 1902, and

said right was specified, determined and allowed in the Final Decree entered on September 8, 1944, in the case entitled *United States of America v. Orr Water Ditch Company, et al.*, Equity No. A-3, in the United States District Court in and for the District of Nevada, as follows:

> "... the plaintiff [United States] is entitled and allowed to divert with a priority of July 2, 1902, through the Truckee Canal 1,500 cubic feet of water per second flowing in the Truckee River for the irrigation of 232,800 acres of land on the Newlands Project, for storage in Lahontan Reservoir, for generating power, for supplying the inhabitants of cities and towns on the project and for domestic and other purposes, and under such control, disposal and regulation as the plaintiff may make or desire, provided that the amount of this water allowed or used for irrigation shall not exceed, after transportation loss and when applied to the land, 3.5 acre-feet per acre for bottom lands, nor 4.5 acre-feet per acre for bench lands under the Newlands Project."

Said Final Decree also specified, determined and allowed the United States to store water in Lake Tahoe with a priority of May 21, 1903, and to release said stored water in an amount:

> "... sufficient to deliver to the head of the Truckee Canal at the Derby Dam, after transportation loss, 1,500 cubic feet per second. The plaintiff is entitled and allowed at will to release and discharge any of the water stored, or by this decree allowed to be stored, in Lake Tahoe and to flow the same and any other water to which it is entitled, according to its priority, through the Truckee River to the Derby Dam and there divert the same through the Truckee

Canal for irrigation, for storage in Lahontan Reservoir, for generating power and for other purposes."

That as a part of said Final Decree, the court approved, adopted and made a part of said Final Decree a Truckee River Agreement, dated July 1, 1935, entered into by the United States, Truckee-Carson Irrigation District, Washoe County Water Conservation District and Sierra Pacific Power Company, and others, and it was specifically provided in said Final Decree that said Truckee River Agreement was binding on the parties signatory thereto. That said Truckee River Agreement accomplished an agreed upon allocation of the diverted flow of the Truckee River (as defined therein) and a regulation of the use of the waters of the Truckee River, including the releases of water stored at Lake Tahoe and Boca Reservoir.

That a copy of said September 8, 1944 Final Decree (including a copy of said July 1, 1935 Truckee River Agreement), entered in the case of *United States of America v. Orr Water Ditch Company, et al.,* Equity No. A-3, in the United States District Court for the District of Nevada is attached hereto as Exhibit "A", and made a part hereof.

VI

On December 18, 1926, the United States and the Truckee-Carson Irrigation District entered into a written contract concerned with the Newlands Project. Under the terms of this contract, the United States turned over to the District in perpetuity the care, operation and maintenance of all lands and project works including the project works referred to in Paragraph IV above, and all other project property. Said contract provided that the District assume liability for and pay to the United States the construction costs of the project. Said contract provided

in part that the District could divert an equitable portion of the waters decreed to the United States in the case of *United States of America v. Orr Water Ditch Company, et al.,* Equity No. A-3, in the United States District Court in and for the District of Nevada, and that the District:

> "shall have a prior right to the economical and beneficial use of all such water in sufficient quantity to properly irrigate 87,500 acres of land, and until such priority has been satisfied, none of the waters shall be diverted or impounded by the United States for use upon other lands."

Said December 18, 1926 written contract provides in part:

> "The Secretary reserves the right, so far as the purport thereof may be consistent with the provisions of this contract, to make reasonable rules and regulations, and to add to and modify them as may be deemed proper and necessary to carry out the true intent and meaning of the law and of this contract, and the District hereby agrees that in the operation of the transferred works, all such rules and regulations will be fully adhered to."

The Secretary of Interior is not authorized by any provision in said contract to enact Operating Criteria and Procedures which would, if enforced, abrogate the substantive rights provided to the District by that contract.

The District has at all times fully complied with the provisions of said December 18, 1926, written contract and has in fact repaid to the United States virtually all of the construction costs of the project. A copy of said December 18, 1926 written contract between the United States and Truckee-Carson Irrigation District is attached hereto as Exhibit "B", and made a part hereof.

VII

That on or about March 12, 1973, the Acting Secretary of Interior caused to be published in the Federal Register so-called Operating Criteria and Procedures for the Newlands Reclamation Project. These so-called Operating Criteria and Procedures for the Newlands Reclamation Project were not written by the Acting Secretary of Interior nor by any other officer or employee of the Department of Interior, and on information and belief, it is alleged that they do not represent the views of the Secretary of Interior and the Department of Interior in major substantive respects. These so-called Operating Criteria and Procedures for the Newlands Reclamation Project are a verbatim copy of a judgment and order which was entered in a case entitled *Pyramid Lake Paiute Tribe of Indians v. Rogers C. B. Morton, Secretary of Interior,* Action No. 2506-70, in the United States District Court for the District of Columbia. The court in that judgment and order directed that the Secretary of Interior adopt said Operating Criteria and Procedures and publish them in the Federal Register. For reasons which are not apparent, known or comprehended, the Secretary of Interior elected to comply, as contrasted to filing an appeal. Said Secretary of Interior did, however, appeal from an order of that Court in that case which awarded attorneys' fees to the Pyramid Lake Paiute Tribe of Indians. That a copy of the so-called Operating Criteria and Procedures for the Newlands Reclamation Project as published by the Acting Secretary of Interior in the Federal Register on or about March 12, 1973, is attached hereto as Exhibit "C", and made a part hereof.

VIII

That at no time has Truckee-Carson Irrigation District been given any hearing or opportunity to be heard to

object to said so-called Operating Criteria and Procedures for the Newlands Reclamation Project.

IX

Truckee-Carson Irrigation District was not named as a party (defendant or otherwise) in that action entitled *Pyramid Lake Paiute Tribe of Indians v. Rogers C. B. Morton, Secretary of Interior,* Action No. 2506-70 in the United States District Court for the District of Columbia, and Truckee-Carson Irrigation District was never served with summons or any other papers or pleadings in that case, and Truckee-Carson Irrigation District had no knowledge of the issues being litigated in that case, and Truckee-Carson Irrigation District never participated in any manner in any of the proceedings in that case, and was never given any opportunity to do so.

X

That the central issue (and in fact the only issue) litigated in that case of *Pyramid Lake Paiute Tribe of Indians v. Rogers C. B. Morton, Secretary of Interior,* Action No. 2506-70 in the United States District Court in and for the District of Columbia, was the amount of water that Truckee-Carson Irrigation District was to be permitted to divert from the Truckee and Carson Rivers for use within the Newlands Project, and the types of uses that Truckee-Carson Irrigation District could make of that water diverted. That the stated and only purpose of that case was to make water available for Pyramid Lake. That in considering the amount of water that Truckee-Carson Irrigation District was to be permitted to divert, and the uses that Truckee-Carson Irrigation District could make of that water diverted the court in that case apparently did not consider the rights of Truckee-Carson Irrigation District as set forth in said December 18, 1926 written

contract between the United States and the Truckee-Carson Irrigation District. In considering the legal propriety of making water available for Pyramid Lake the court in that case apparently did not consider the basic issue of whether the Pyramid Lake Paiute Tribe of Indians had any right to the use of the water for that purpose, or whether the Final Decree entered in the case of *United States of America v. Orr Water Ditch Company, et al.*, Equity No. A-3 in the United States District Court for the District of Nevada, was res judicata and barred a claim of right to the use of the water for that purpose. Apparently these basic issues were never raised by the attorneys for the Secretary of Interior in that case. The court in that case apparently focused attention on operating criteria which the court believed had been in effect since November 1, 1971, notwithstanding the fact that Truckee-Carson Irrigation District had consistently challenged the validity of that operating criteria as being illegal and unauthorized and in conflict with the provisions of the December 18, 1926 written contract between Truckee-Carson Irrigation and the United States.

XI

The so-called Operating Criteria and Procedures for the Newlands Reclamation Project as published in said Federal Register on or about March 12, 1973, are in flagrant violation of the substantive rights of Truckee-Carson Irrigation District in that they would deny to the District contractual rights which are set forth in the December 18, 1926 written contract between the District and the United States, including, but not limited to the following:

1. The right to divert Truckee River water in an amount sufficient to properly irrigate 87,500 acres of land in the Newlands Project. In fact the total allowable

diversions of the water of the Truckee and Carson Rivers as specified in said so-called Operating Criteria and Procedures for the Newlands Reclamation Project (288,120 acre-feet), would be patently insufficient to properly irrigate the approximate 70,000 acres of project lands presently irrigated, and further would result in a water duty per acre for project lands substantially below the water duty per acre which was specified, determined and allowed by the September 8, 1944, Final Decree entered in the case of *United States of America v. Orr Water Ditch Company, et al.,* Equity No. A-3, in the United States District Court for the District of Nevada.

2. The right to divert Truckee River water for the irrigation of the community pasture.

3. The right to use Lahontan Reservoir to the full extent of its capacity for irrigation during the year in which water is stored and for carry-over storage for future years.

4. The right to divert Truckee River water for the production of power at Lahontan.

5. The unrestricted right to divert Truckee River water for use on lands within the Carson Division of the Newlands Project.

In addition to the above, said so-called Operating Criteria and Procedures for the Newlands Reclamation Project impose on Truckee-Carson Irrigation District the requirement of establishing a system of charging for water which is in conflict with existing water right contracts with individual water users, and further requires the District to spend large sums and to engage in specified practices and programs which are totally unrelated to the District's agreed upon duty to care for, operate and maintain the project and to repay to the United States the

costs incurred by the United States in constructing the project.

Further, the limitations and restrictions which are attempted to be imposed upon the District by said so-called Operating Criteria and Procedures for the Newlands Reclamation Project abrogate in almost every material respect the major provisions and benefits to the District as provided in the July 1, 1935 Truckee River Agreement, which was entered into by the District and the United States (and others), and which was approved, adopted by the court and made a part of the Final Decree in the case of *United States of America v. Orr Water Ditch Company, et al.,* Equity No. A-3, in the United States District Court for the District of Nevada, and further are an illegal attempt to transfer to Pyramid Lake adjudicated rights to the use of the waters of the Truckee River on Newlands Project lands, and are in direct and flagrant violation of the United States' specific agreement in the December 18, 1926 written contract between the United States and the District that it would not use any of said waters on any other lands unless and until the prior right of the Truckee-Carson Irrigation District to receive waters in sufficient quantity to properly irrigate 87,500 acres of project land had been satisfied.

XII

If the so-called Operating Criteria and Procedures for the Newlands Reclamation Project as published in the Federal Register on or about March 12, 1973 were enforced, Truckee-Carson Irrigation District would be deprived of valuable property rights without a hearing and without due process of law and in violation of the laws and Constitution of the United States. If said so-called Operating Criteria and Procedures for the Newlands Reclamation Project were enforced, the individual owners

of rights to the use of waters of the Truckee River for irrigation on their lands within the project, would be deprived of valuable property rights without a hearing and without due process of law and in violation of the laws and Constitution of the United States.

XIII

The United States District Court for the District of Columbia had no jurisdiction over the use of the waters of the Truckee River in the State of Nevada, including the use of those waters by Truckee-Carson Irrigation District and the individual landowners within the District. The United States District Court in the District of Columbia had no personal jurisdiction over said landowners or said District. The Acting Secretary of Interior's attempt to make that court's determination of the District's and said landowners' right to the use of the waters of the Truckee River binding and enforceable through the guise of purported so-called Operating Criteria and Procedures for the Newlands Reclamation Project is an arbitrary and unreasonable act, contrary to law and in flagrant violation of basic concepts of due process, and it is therefore void, and of no legal effect whatsoever, and Truckee-Carson Irrigation District has so informed the United States and its Secretary of Interior.

XIV

The Acting Secretary of Interior in adopting and publishing the so-called Operating Criteria and Procedures for the Newlands Reclamation Project, and the Court in the case of *Pyramid Lake Paiute Tribe of Indians v. Rogers C. B. Morton,* No. 2506-70, in the District Court for the District of Columbia, gave absolutely no consideration to

the substantial adverse environmental effect upon Stillwater Wildlife Refuge and the other areas within the project, including the community pasture, which would clearly result from the so-called Operating Criteria and Procedures for the Newlands Reclamation Project. In fact, the Secretary of Interior specifically directed his staff to ignore that substantial adverse environmental effect in presenting proposed Operating Criteria and Procedures to the Secretary of Interior and to the Court in that case. Truckee-Carson Irrigation District contends that such adverse effect on Stillwater Wildlife Refuge and the other areas within the project, including the community pasture, was an important environmental factor which the Department of Interior, the Secretary of Interior, the Acting Secretary of Interior and the Court in that case were required by law to consider in adopting so-called Operating Criteria and Procedures for the Newlands Reclamation Project. On information and belief, it is alleged that at no time has the Department of Interior or anyone else prepared an environmental impact statement concerned with the impact of the so-called Operating Criteria and Procedures for the Newlands Reclamation Project on the environment, including the impact on Stillwater Wildlife Refuge, as required by the National Environmental Policy Act of 1969 (42 U.S.C. 4332(c)), and that the Department of Interior, and its Secretary and the Court, in adopting said so-called Operating Criteria and Procedures for the Newlands Reclamation Project, completely ignored the national policies as set forth in said act (42 U.S.C. 4331 *et seq.*), and that the so-called Operating Criteria and Procedures for the Newlands Reclamation Project are, therefore, invalid.

XV

In the recently filed case of *United States of America v. Truckee-Carson Irrigation District, et al.*, Civil No. R-

2987, in the United States District Court for the District of Nevada, the United States on behalf of the Pyramid Lake Paiute Tribe of Indians asserts in its complaint alleged rights to the use of the waters of the Truckee River and its tributaries for Pyramid Lake. These claims of right are disputed by almost every user of those waters in the State of Nevada, and by the State of Nevada. This claim of right to the use of the waters of the Truckee River and its tributaries asserted by the United States on behalf of the Pyramid Lake Paiute Tribe of Indians is the basic issue in that litigation. Through the guise of so-called Operating Criteria and Procedures for the Newlands Reclamation Project, the Secretary of Interior is attempting to take water from Truckee-Carson Irrigation District and the water users within that District so that it can be delivered to Pyramid Lake, and thus circumvent and avoid the impact of a possible adverse determination by this court on that basic issue in that case. The Secretary of Interior is in essence placing on Truckee-Carson Irrigation District and the water users within that District, the entire burden of providing water to satisfy the claims of the United States on behalf of the Pyramid Lake Paiute Tribe of Indians. Truckee-Carson Irrigation District and the water users within that District have admitted rights to the use of those waters with a date of priority of July 2, 1902, and Truckee-Carson Irrigation District and the water users within that District were given no hearing and they were not parties to the action where their rights to the use of these waters were curtailed. If said so-called Operating Criteria and Procedures for the Newlands Reclamation Project were to be enforced, Truckee-Carson Irrigation District and the water users within said District would be stripped of water vitally needed for the irrigation of some 70,000 acres of project lands which are presently irrigated, and

without which those lands would be barren and non-productive. This water has been used by the landowners within said District for over 70 years and the District has operated and maintained this project and its project facilities, and delivered the water to these landowners for over 48 years. The District and the landowners have, over the years, repaid to the United States virtually all of the project's construction costs, and if the District's contractual right to sufficient water to irrigate 87,500 acres of land and its other contractual rights are to be abrogated so as to make water available for use at Pyramid Lake, the right to use that water at Pyramid Lake should first be determined by this court, in that recently filed case of *United States of America v. Truckee-Carson Irrigation District, et al.*, Civil No. R-2987, particularly when the right of Truckee-Carson Irrigation District to use that water for irrigation on project lands and for other project purposes has been set forth in a valid written contract, and has been specified, determined and allowed by a Final Decree entered on September 8, 1944, by a federal court which did have subject matter jurisdiction of those waters, and personal jurisdiction over all the parties affected by that Final Decree.

XVI

The amount of the waters of the Truckee River and its tributaries that is to be legally available for uses upstream from Pyramid Lake is dependent on the determination by this court as to the validity of the claims of the United States on behalf of the Pyramid Lake Paiute Tribe of Indians to the use of said waters for Pyramid Lake as alleged in its complaint in the recently filed case of *United States of America v. Truckee-Carson Irrigation District*, Civil No. R-2987. If those claims are determined to be valid, the diversions to the Newlands Project (and every other diversion on the Truckee River) will have to be

curtailed. If those claims are determined to be invalid, there would be no legitimate reason to disturb the existing diversions for these existing diversions were specified, determined and allowed in the Final Decree (including the July 1, 1935 Truckee River Agreement) entered by this court on September 8, 1944, in the case of *United States of America v. Orr Water Ditch Company, et al.,* Equity No. A-3.

XVII

Truckee-Carson Irrigation District and the water users within the District have rights to the use of the waters of the Truckee River and its tributaries with an admitted and adjudicated priority of July 2, 1902. If this court were to eventually determine in the recently filed case of *United States of America v. Truckee-Carson Irrigation District, et al.,* Civil No. R-2987, that the water right claims of the United States on behalf of the Pyramid Lake Paiute Tribe of Indians as alleged in its complaint were valid, there would be insufficient water available to satisfy those rights and all the other rights to the use of those waters upstream in the State of Nevada. In that event the law would require that the users with priorities subsequent to July 2, 1902, cease their diversions and uses of those waters before Truckee-Carson Irrigation District could be compelled to curtail its diversion and uses of those waters. Truckee-Carson Irrigation District contends that if the so-called Operating Criteria and Procedures for the Newlands Reclamation Project were enforced, it would accomplish an unconscionable result. It would require Truckee-Carson Irrigation District and the water users within that District, to immediately curtail their existing valid adjudicated water right uses so as to provide water for Pyramid Lake for uses which are, at this stage, unadjudicated claims, and at the same time those users of the waters of the Truckee River and its

tributaries whose date of priority is subsequent to July 2, 1902, could continue to use those waters without restriction. Truckee-Carson Irrigation District contends that no existing valid right to the use of these waters should be curtailed by this court or by the Department of Interior or its Secretary, until the claims of the United States on behalf of the Pyramid Lake Paiute Tribe of Indians as alleged in its complaint, in the recently filed case of *United States of America v. Truckee-Carson Irrigation District, et al.,* R-2987 are determined. Truckee-Carson Irrigation District contends that the uses of the waters of the Truckee River and its tributaries should continue under the jurisdiction of the watermaster appointed by this court in the case of *United States of America v. Orr Water Ditch Company, et al.,* Equity No. A-3, and that such uses be subject to the provisions of the September 8, 1944 Final Decree (including the July 1, 1935 Truckee River Agreement) entered in that case. The Secretary of Interior should not be allowed to abrogate existing written contracts, agreements and decrees by the adoption of so-called Operating Criteria and Procedures for the Newlands Reclamation Project, which, if adhered to, would require one single water user to substantially curtail long-standing adjudicated water right uses so as to provide water for a claim of right which is the subject of litigation and which is seriously contested.

XVIII

Truckee-Carson Irrigation District has refused and continues to refuse to comply with the so-called Operating Criteria and Procedures for the Newlands Reclamation Project as published in the Federal Register by the Acting Secretary of Interior on or about March 12, 1973. The District has consistently so advised said Department of Interior, and its Secretary and has advised the Department and its Secretary that said so-called Operating

Criteria and Procedures for the Newlands Reclamation Project were in violation of the District's December 18, 1926 written contract with the United States and the Final Decree (including the July 1, 1935 Truckee River Agreement) entered in the case of *United States of America v. Orr Water Ditch Company, et al.*, Equity No. A-3, in the United States District Court for the District of Nevada, and that the Secretary of Interior's attempt to impose on the District the so-called Operating Criteria and Procedures for the Newlands Reclamation Project was unreasonable, arbitrary, contrary to law and in flagrant violation of basic concepts of due process, and void and of no legal effect whatsoever.

XIX

On September 14, 1973, the Secretary of the Department of Interior gave notice to Truckee-Carson Irrigation District that the December 18, 1926 written contract between the United States and the Truckee-Carson Irrigation District will be terminated as of October 31, 1974, because of the District's refusal to comply with the so-called Operating Criteria and Procedures for the Newlands Reclamation Project published by the Acting Secretary of Interior in the Federal Register on March 12, 1973, and that on November 1, 1974, the Bureau of Reclamation would take over the operation and maintenance of the project and the project facilities, and thereafter operate the project in the manner as specified in said Operating Criteria and Procedures for the Newlands Reclamation Project.

XX

By letter dated November 5, 1973, Truckee-Carson Irrigation District rejected that notice of termination and requested that said notice of termination of the December

18, 1926 written contract be rescinded and withdrawn by the Secretary of Interior. That a copy of this letter of November 5, 1973 is attached hereto, marked Exhibit "D", and made a part hereof. In a letter of January 9, 1974 to the District, the Secretary of Interior referred to the recently filed action of *United States of America v. Truckee-Carson Irrigation District, et al.*, Civil No. R-2987, in the United States District Court for the District of Nevada, and stated that such action would determine "... once and for all the nature and extent of the entitlement of the Pyramid Lake Paiute Tribe of Indians to waters of the Truckee River," and that such action would afford Truckee-Carson Irrigation District " ... the opportunity to be heard on this issue in an appropriate legal forum ...," and that it was his desire that such action be prosecuted with dispatch so that " ... a final and satisfactory solution to this longstanding problem can be achieved ...," but that " ...he did not think it "appropriate" nor, "legally permissible" to withdraw his notice of termination of the December 18, 1926 contract. That a copy of said January 9, 1974, letter of the Secretary of Interior is attached hereto, marked Exhibit "E", and made a part hereof. Truckee-Carson Irrigation District has been recently informed that the Secretary of Interior still intends to terminate the December 18, 1926 written contract between the United States and the District on October 31, 1974, and to then have the Bureau of Reclamation of the Department of the Interior take over the operation and maintenance of the project facilities on November 1, 1974, and to thereafter operate the project in the manner as specified in said so-called Operating Criteria and Procedures for the Newlands Reclamation Project.

XXI

An actual controversy has arisen and now exists between Truckee-Carson Irrigation District and the Department of Interior and its Secretary concerning their respective rights and duties. The Department of Interior and its Secretary contend that the so-called Operating Criteria and Procedures for the Newlands Reclamation Project were published in the Federal Register by the Acting Secretary of Interior on March 12, 1973, pursuant to the judgment and order of the court in the case of *Pyramid Lake Paiute Tribe of Indians v. Rogers C. B. Morton, Secretary of Interior*, Action No. 2506-70 in the United States District Court for the District of Columbia, and that the District's refusal to comply with those so-called Operating Criteria and Procedures for the Newlands Reclamation Project requires the Secretary to terminate the December 18, 1926 written contract and have the Bureau of Reclamation take over the project, and to thereafter operate and maintain the project in the manner as specified in said so-called Operating Criteria and Procedures for the Newlands Reclamation Project. It is the contention of Truckee-Carson Irrigation District that the provisions of said so-called Operating Criteria and Procedures for the Newlands Reclamation Project flagrantly violate the provisions of the District's December 18, 1926 contract, and that they are in no manner authorized by that contract, or otherwise, and that they flagrantly violate the provisions of the existing Final Decree (including the provisions of the July 1, 1935 Truckee River Agreement) entered on September 8, 1944 in the case of *United States of America v. Orr Water Ditch Company, et al.*, in the United States District Court for the District of Nevada, and that Truckee-Carson Irrigation District never agreed or consented to have its rights determined by a judgment and order entered in a case in a distant court in which it was not a party, and that the

attempt by the Secretary of Interior to accomplish this result by publishing verbatim such a court's judgment and order in the Federal Register, and calling it Operating Criteria and Procedures for the Newlands Reclamation Project, and contending that the District must adhere hereto, in fact deprives the district and the landowners within the District of valuable property rights without due process of law and is a patent violation of the laws and Constitution of the United States, and that the attempt by the Department of Interior and its Secretary to impose the so-called Operating Criteria and Procedures for the Newlands Reclamation Project on the District is clearly illegal.

XXII

Truckee-Carson Irrigation District desires a judicial determination of its rights and duties with respect to the so-called Operating Criteria and Procedures for the Newlands Reclamation Project, and a declaration as to whether the notice of termination of the December 18, 1926 written contract between it and the United States and the threatened takeover of the project facilities by the United States was or is lawful and whether it must adhere to said notice of termination and takeover in light of the facts as alleged herein. Such a declaration is necessary and appropriate in order that Truckee-Carson Irrigation District can ascertain its rights and duties in the premises.

XXIII

At the present time, the species of trout in Pyramid Lake are thriving. There are ample flows of waters of the Truckee River into Pyramid Lake to satisfy any conceivable use of water by members of the Pyramid Lake Paiute Tribe of Indians. There is no urgency or need whatsoever to curtail the existing upstream diversions and uses of the

waters of the Truckee River and its tributaries by Truckee-Carson Irrigation District, or anyone else. That if the so-called Operating Criteria and Procedures for the Newlands Reclamation project were adhered to (either by the District or by the United States) the waters formerly used to irrigate the lands within the Newlands Project would just become a part of Pyramid Lake and become a part of the 440,000 acre-feet of water which evaporates each year from the water surface of Pyramid Lake.

XXIV

If the so-called Operating Criteria and Procedures for the Newlands Reclamation Project were to be adhered to, approximately 2,400 individual users of the waters of the Truckee River on lands within the Truckee-Carson Irrigation District, would suffer irreparable damage and loss, for they would be deprived of approximately 120,000 acre-feet of water annually, that is essential to the continuance of their livestock-oriented agricultural farming activities. A substantial portion of the approximate 70,000 acres of lands within the District which are presently irrigated by these individual users, are now planted to crops such as alfalfa, which is a perennial crop, and these crops are dependent on an adequate water supply which would not be available if the so-called Operating Criteria and Procedures for the Newlands Reclamation Project were enforced. In that event many acres of these crops would have to be abandoned, and the crops now growing on these acres would be irretrievably lost, and in many instances, these individual users would have to cease their farming activities for the water remaining and available would be insufficient to irrigate enough of their lands to make their farming activities profitable. The Fallon area with a population of approximately 12,000 people is

dependent on the existence and continuance of a prosperous agricultural industry within the District. A substantial number of these people derive their income, either directly or indirectly, from this agricultural industry. If the so-called Operating Criteria and Procedures for the Newlands Reclamation Project were enforced, there would be an immediate and sharp drop in farm production and consequent income, and this would have a substantial adverse effect on the Fallon area and the approximate 12,000 people who live in that area. If the so-called Operating Criteria and Procedures for the Newlands Reclamation Project were enforced, it would virtually destroy the Stillwater Wildlife Refuge, which is a major refuge for migratory birds and other birds and wildlife. This refuge is now dependent and since its inception has been dependent almost entirely on the drainage water and return flows from the irrigated lands within the District, and the reduction in the water supply available for the irrigation of the lands within the District would result in a disproportionately more drastic reduction in the drainage waters and return flows upon which Stillwater Wildlife Refuge is dependent, with the result that Stillwater Wildlife Refuge would, in all probability, not receive enough water to continue as a refuge.

XXV

For the last several years, the Truckee River watershed has experienced an above normal rainfall and snowpack. To date this year, the rainfall and snowpack is substantially above normal. As a consequent result of the above (and other factors), there is, in all probability, ample water available to satisfy all the existing uses of the waters of the Truckee River and its tributaries in the State of Nevada which have rights to the use of those waters as specified, determined and allowed by the September 8, 1944 Final Decree (and as provided in the July

1, 1935 Truckee River Agreement) entered in the case of *United States of America v. Orr Water Ditch Company, et al.,* Equity No. A-3, in the United States District Court in and for the District of Nevada, and to also permit inflows into Pyramid Lake of the volumes of flow which the United States asserts on behalf of the Pyramid Lake Paiute Tribe of Indians in the recently filed case of *United States of America v. Truckee-Carson Irrigation District, et al.*, Civil No. R-2987. Consequently, there is no urgent need at this time for the United States to take over the project and to adhere to the so-called Operating Criteria and Procedures for the Newlands Reclamation Project so as to provide water for Pyramid Lake, for Pyramid Lake, in all probability, will receive that water in any event.

XXVI

None of the individual water users on the Newlands Project most of whom are the owners of valid rights to the use of the waters of the Truckee River and its tributaries, have been named as defendants in the recently filed action of *United States of America v. Truckee-Carson Irrigation District, et al.,* Civil No. R-2987, in the United States District Court for the District of Nevada, and they are not parties to that action. If the United States were to be permitted at this time to terminate the December 18, 1926 contract between the United States and the District and to take over the operation and maintenance of the project facilities on November 1, 1974, there would be no party in that case who would be responsible for representing the interests of those individual water users, for the District would, in all probability, become inactive and in any event the District would have no legal interest in the waters of the Truckee River and its tributaries, for its legal interest in those waters is premised on the existence of the December 18, 1926 written contract between it and the United States. The United States could not represent

the interests of these individual water users on the Newlands Project, for it represents the Pyramid Lake Paiute Tribe of Indians, and the United States is claiming on their behalf rights to the use of the waters of the Truckee River and its tributaries which are directly in conflict with the rights of these individual water users to the use of those waters. It is the contention of Truckee-Carson Irrigation District that the United States should not be permitted at this stage to terminate the December 18, 1926 written contract between it and the District and to take over the project on November 1, 1974, for that would effectively preclude the interests of the many individual water users on the Newlands Project who use and have rights to the use of the waters of the Truckee River and its tributaries from being represented in that recently filed case. These individual water users as a group constitute one of the major users of the waters of the Truckee River and its tributaries, and justice and for that matter due process of law requires that their interests be represented in that case.

XXVII

Truckee-Carson Irrigation District alleges that Robert J. Pafford, the Regional Director of the Bureau of Reclamation for the region which includes the Newlands Project, testified in the case of *Pyramid Lake Paiute Tribe of Indians v. Rogers C. B. Morton,* Civil Action No. 2506-70, in the United States District Court for the District of Columbia, as follows:

> ". . . if we were to take over actual operation [of the Newlands Project] we would have to budget funds. As I said, it costs the District about a half million dollars a year. The federal budget process takes about eighteen months lead time to get the money. We would have to get the manpower to do it. We

> undoubtedly would have to put our own ditch riders out to govern deliveries to the farms. It would take two to three years for them to get familiar enough with the actual farms, variations in the farms, and the actual water deliveries required on the individual farms to know whether some farmer was just yelling for water or whether he needed it . . . I would say it would take three to five years to take it over and operate it effectively with a Federal group."

The above-quoted testimony of Mr. Pafford was given under oath on October 24, 1972, and it was given on direct examination as part of the Secretary of Interior's presentation of evidence in that case, and it was not in any manner contradicted.

Truckee-Carson Irrigation District alleges that it has operated and maintained the project facilities for over 48 years and is presently doing so. The District alleges that it, and its employees, have the experience and expertise to effectively do the job. If the Bureau of Reclamation were to take over the operation and maintenance of the project facilities on November 1, 1974, as threatened by the Secretary of Interior, it would, according to the sworn testimony of the Regional Director of the Bureau of Reclamation, take three to five years for the Bureau to effectively do the job. Truckee-Carson Irrigation District contends that this is one more reason that the status quo should be maintained pending the resolvement by this court of the issues raised in this case, and in the recently filed case of *United States of America v. Truckee-Carson Irrigation District,* Civil No. R-2987. During that period, Truckee-Carson Irrigation District and all other water users would continue to be subject to the provisions of this court's September 8, 1944 Final Decree (including the provisions of the July 1, 1935 Truckee River Agreement) entered in the case of *United States of America v.*

Orr Water Ditch Company, Equity No. A-3, and the administration of that Final Decree and Agreement by this court's appointed watermaster in that case.

WHEREFORE, Truckee-Carson Irrigation District Prays as Follows:

1. That this Court enter a preliminary injunction which would enjoin the attempt by the Secretary of Interior to terminate the December 18, 1926 written contract, and to have the Bureau of Reclamation take over the operation and maintenance of the project facilities on November 1, 1974, pending the resolvement of the basic issues by this Court in this case and in the recently filed case of *United States of America v. Truckee-Carson Irrigation District, et al.*, Civil No. R-2987.

2. That this Court declare that the Secretary of Interior's attempt to impose the provisions of the so-called Operating Criteria and Procedures for the Newland Reclamation Project on Truckee-Carson Irrigation District is imroper and contrary to law, and that the Secretary of Interior's notice of termination of the December 18, 1926 written contract was invalid, and that the attempt by the Secretary of Interior to have the Bureau of Reclamation take over the operation and maintenance of the project facilities is without right. That equity and justice would best be served if this Court were to first determine the basic issue in the recently filed case of *United States of America v. Truckee-Carson Irrigation District, et al.*, Civil No. R-2987, which is whether the claims of the United States on behalf of the Pyrmaid Lake Paiute Tribe of Indians as to the use of the waters of the Truckee River and its tributaries, for Pyramid Lake, are valid.

3. That Truckee-Carson Irrigation District recover its costs of suit herein.

4. For such other and further relief as to this Court seems proper in the premises.

Dated: March 18, 1974.

/s/ E. J. Skeen
E. J. SKEEN

/s/ James W. Johnson, Jr.
JAMES W. JOHNSON, JR.

/s/ Frederick G. Girard
FREDERICK G. GIRARD

VERIFICATION

United States of America
District of Nevada

James D. Wood, being duly sworn deposes and says:

He is the Manager and Secretary and Treasurer of Truckee-Carson Irrigation District, the plaintiff in this action; that he has read the foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters he believes it to be true.

/s/ James D. Wood
James D. Wood

Subscribed and sworn to before me this 18th day of March, 1974.

/s/ Diane E. Seevers
Notary Public for the State
of Nevada, Washoe County

My commission expires:
December 27, 1975

Appendix M: Pretrial Order, Truckee-Carson Irrigation District v. Secretary of the Department of the Interior, Civ. No. R-74-34-BRT, March 30, 1979.

United States District Court
District of Nevada

Civil No. R-74-34-BRT

Truckee-Carson Irrigation District,
Plaintiff,

v.

Secretary of the Interior,
Defendant.

[Filed Mar. 30, 1979]

PRETRIAL ORDER

Following pretrial proceedings in this cause pursuant to Local Rule 17, IT IS ORDERED:

I.

NATURE OF CASE

In this action Plaintiff, Truckee-Carson Irrigation District (hereinafter "TCID") has commenced suit against the Secretary of the Interior. TCID seeks a declaratory judgment as to the validity and applicability of certain "Operating Criteria and Procedures for Coordinated Operation and Control of the Truckee and Carson Rivers for Service to Newlands Project" (hereinafter referred to as "Operating Criteria") published in the Federal Register by the Secretary of the Interior pursuant to the judgment and order of the Court of the United States District Court for the District of Columbia in the Case of *Pyramid Lake Paiute Tribe of Indians v. Morton*, Civil Action No. 2506-70. TCID also challenges the legal validity of a September 14, 1973 notice of termination of TCID's December 18, 1926 contract with the United States of America.

Defendant Secretary of the Interior bases this contract termination upon TCID's alleged violation of the Operating Criteria. The Pyramid Lake Paiute Tribe of Indians has intervened on the side of the Secretary.

II.
JURISDICTION

TCID alleged jurisdiction under 28 USC § 1331(a) and 5 U.S.C. §§ 701-706 of the Administrative Procedure Act. This latter statute has been subsequently held not to confer jurisdiction, *Califano v. Sanders,* 430 U.S. 99 (1977).

Defendant and Intervenor contest the jurisdiction of this Court on the ground that the suit is in reality one against the United States of America, and is thus barred by the doctrine of sovereign immunity.

III.
UNCONTESTED FACTS DEEMED MATERIAL IN THIS ACTION

The following facts are admitted by the parties and require no proof:

1. Truckee-Carson Irrigation District is an irrigation district, created, organized and existing under and by virtue of the laws of the State of Nevada with its principal place of business at Fallon, Churchill County, Nevada. The District operates and manages the Newlands Reclamation Project.

2. The construction of the Newlands Reclamation Project by the United States was authorized by the Secretary of the Interior on March 14, 1903, pursuant to Federal Reclamation law. The main project features include Lahontan Dam and Reservoir, outlet works at Lake

Tahoe, Derby Diversion Dam on the Truckee River, Carson Diversion Dam, Lahontan Powerplant and an extensive system of main canals, laterals and open drains. Title to these works is held by the United States.

3. The Newlands Reclamation Project is located in Western Nevada, east of the Sierra Nevada Mountains, and it is comprised of two divisions, the Truckee Division and the Carson Division. The majority of the irrigated lands are in the Carson Division which is in the Carson River watershed. The project utilizes water from both the Truckee and Carson Rivers. The water from the Truckee River is diverted at Derby Dam into the Truckee Canal which carries the water from the Truckee River to Lahontan Dam and Reservoir, a distance of approximately 32.5 miles. That water can be and is diverted directly from the Truckee Canal and/or into Lahontan Reservoir. That water is utilized for irrigating lands within the Truckee-Carson Irrigation District, and for other purposes.

In its natural state the Truckee River flowed from its outlet at Lake Tahoe in California, into Nevada and then to its terminus in Pyramid Lake.

4. On December 18, 1926, the United States of America and the Truckee-Carson Irrigation District entered into a contract providing for, among other things, the transfer of the care, operation and maintenance of the irrigation works of the Newlands Reclamation Project to the District and for the repayment of the construction charges by the District. A copy of that contract is attached to the Complaint as Exhibit "B".

5. On December 31, 1926, and pursuant to the above-referenced December 18, 1926 written contract, care, operation and maintenance of the irrigation and other project works were transferred to TCID, and TCID has exercised the care, operation and maintenance over the

project and its irrigation and other project works since that date, and to date TCID has made the repayments of the project's construction costs to the United States as provided by law and the December 18, 1926 written contract between TCID and the United States.

6. The Acting Secretary of the Interior published in the Federal Register on March 12, 1973, 38 Fed. Reg. 6697, the Operating Criteria and Procedures attached as Exhibit "C" to the Complaint.

7. TCID's annual irrigation diversions in 1973 exceeded the 350,000 acre feet diversion as specified in the Operating Criteria.

8. TCID's diversions of water from the Truckee River during the 1973 irrigation season exceeded the diversion criteria as set forth in the Operating Criteria.

9. During the 1973 irrigation season TCID did not use or operate Stampede Reservoir as provided by the Operating Criteria, or at all.

10. By letter dated September 14, 1973 the Secretary of the Interior notified TCID that the District's December 18, 1926 contract was terminated as of October 13, 1974. By letter dated November 5, 1973 TCID advised the Secretary of the Interior that his notice of contract termination was arbitrary, unreasonable, and contrary to the law and void. A copy of TCID's letter of November 5, 1973 is attached to the complaint as Exhibit D.

IV.
FACTS NOT ADMITTED BUT UNCONTESTED

None.

V.
CONTESTED ISSUES OF FACT

In accordance with Local Rule 17, the parties have attempted to separate the issues of fact from the issues of law. It should be noted, however, that many are mixed factual and legal issues and should be considered incorporated into those respective sections.

A. The following are issues of fact to be tried and determined upon trial:

1. Whether the implementation and enforcement of the Operating Criteria would abrogate or impair the contractual and decreed rights of TCID and its members.

2. Whether TCID'S admitted annual irrigation diversions and TCID's admitted diversions of water from the Truckee River during the 1973 irrigation season which exceeded the diversion criteria as set forth in the Operating Criteria constituted violations of the December 18, 1926 contract between TCID and the Secretary of the Interior.

3. Whether TCID could be legally ordered to use Stampede Reservoir.

4. Whether the case of *Pyramid Lake Paiute Tribe of Indians v. Morton* was a sham suit.

5. What violation of the Operating Criteria occasioned the Secretary of the Interior's September 14, 1973 notice of contract termination?

6. Whether prior to September 14, 1973 TCID failed to comply with any of the provisions of Section C of the Operating Criteria and Procedures promulgated by the Secretary of the Interior on March 12, 1973, 38 Fed. Reg. 6697 (1973).

ADDITIONAL ISSUES OF FACT

B. Plaintiff's statement of additional issues of fact:

1. Whether TCID received adequate notice of the Operating Criteria.

2. Whether the provisions of Section C of the Operating Criteria were so onerous and/or incapable of being legally complied with so as to result in their being arbitrary and unreasonable.

3. Did the Secretary publish and attempt to enforce the Operating Criteria because he was ordered by the Court in the case of *Pyramid Lake Tribe of Indians v. Morton* to do so.

4. Whether TCID was a party to the case of *Pyramid Lake Tribe of Indians v. Morton,* Civil Action No. 2506-70, in the United States District Court for the District of Columbia, and whether TCID was ever served with summons or other process in that case.

5. Whether any individual landowner or water user within the Newlands Project, or owner of a project water right contract or an approved project water right application was a party to the case of *Pyramid Lake Tribe of Indians v. Morton,* Civil Action No. 2506-70, in the United States District Court for the District of Columbia, or whether any such person or entity was served with summons or other process in that case.

C. Defendant's statement of additional issues of fact:

1. Whether since 1973 and continuing to the present, the Truckee-Carson Irrigation District has continued to knowingly violate the Operating Criteria which have been published in the Federal Register each year and has failed and refused to comply with those Criteria in any material respect.

2. Whether at one time 42,447 acres of land within the District were subject to an agreement which provided for a 3 acre foot per acre limitation of project water.

3. Whether irrigated lands with the Truckee Division of the Project received in excess of 4.5 acre feet of water per acre delivered to the land during the 1973 irrigation season.

4. Did TCID, in fact, advise and consult with representatives of the United States during the trial of *Pyramid Lake Tribe of Indians v. Morton* regarding the factual and legal issues involved in that litigation?

VI.
CONTESTED ISSUES OF LAW

A. The following are the issues of law to be tried and determined upon trial:

1. Whether the Court has jurisdiction of the subject matter and of the parties to this action.

2. Whether Truckee-Carson Irrigation District has exhausted its administrative remedies.

3. Whether TCID can be bound by the Operating Criteria which was attached to the Judgment and Order of the Court in the case of *Pyramid Lake Paiute Tribe of Indians v. Morton,* which the Secretary published and is attempting to implement and enforce.

4. The effect of that provision in the Operating Criteria which states:

> "(1) Nothing in this Judgment and Order shall constitute an interpretation or modification of either the Alpine or Orr Water Ditch decrees, nor shall it be deemed to affect the rights of any person under either of such decrees, so long as they remain in effect."

5. In determining the legality of the Operating Criteria must it be reviewed in light of all its provisions or each separate provision.

6. Whether the Secretary of the Interior's September 14, 1973 notice of termination of TCID's December 18, 1926 contract was legal.

7. Whether the Secretary of the Interior has complied with the provisions of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(c).

8. The extent of the Secretary of the Interior's authority to adopt rules and regulations or Operating Criteria under the December 18, 1926 contract and the law.

9. Whether 5 U.S.C. § 706(2) sets the scope of review to be applied by this Court in reviewing the legality of the Operating Criteria and Procedures and the termination of the 1926 contract.

10. Whether non-compliance by the Truckee-Carson Irrigation District of the Operating Criteria and Procedures during the 1972-73 water year constitutes violations of its contract with the United States.

11. Whether the notice to terminate the contract was legal.

12. Whether the 1926 contract between the United States and TCID has been terminated.

13. Whether the United States has a lawful right to possession and control of the Newlands Reclamation Project.

14. Is TCID is privity with the Secretary of the Interior for purposes of res judicata and collateral estoppel and thus bound by the judgment in *Pyramid Lake Paiute Tribe of Indians v. Morton,* 354 F.Supp. 252 (D.C.

1973) or is otherwise foreclosed from challenging the outcome of that litigation.

15. Whether TCID and/or its members possess any water rights in the Truckee and Carson Rivers independent of those held by the United States.

B. Defendant's statement of additional issues of law:

1. Whether administrative regulations promulgated by the Secretary of the Interior pursuant to an order of a United States District Court can be found to be unlawful.

2. Whether Truckee-Carson Irrigation District's refusal to comply with the Operating Criteria published in the Federal Register since the notice of contract termination was given are violations of the 1926 contract.

3. What legal effect does the fact that Pyramid Lake Cui-ui have been listed as endangered species pursuant to the Endangered Species Act of 1973, 16 U.S.C. § 1531, *et seq.*, (50 C.F.R. § 17.11) and Pyramid Lake Lahontan Cutthroat Trout are listed as threatened species have on this Court's review of the Operating Criteria and Procedures and the termination of the 1926 contract.

4. Whether the Secretary of the Interior was and is required to issue rules and regulations that insure that the use of water on the Newlands Reclamation Project was and is reasonable, economical, and beneficial.

VII.
EXHIBITS AND WITNESSES

All parties agree that they will lodge all exhibits with the Court 45 days before the trial date. The parties will file with the Court 30 days before trial a supplemental pretrial order which will include:

(a) Lists or schedules of all exhibits which will be offered in evidence by the parties at the trial. Such lists or schedules shall:

(1) Describe the exhibits sufficiently for ready identification;

(2) Indicate those exhibits agreed by the parties to be admissible at trial; and

(3) With respect to each exhibit on the lists or schedules, counsel shall either agree as to admissibility or reach such stipulations regarding the exhibits as is possible. Stipulations as to authenticity and identification of documents shall be made whenever possible. All objections to exhibits and grounds for objections shall be listed.

(b) A statement of counsel for each party indicating any depositions intended to be offered by him at the trial, indicating with respect thereto the portions to be offered and the party or parties against whom they will be offered.

(c) A statement by counsel for the party or parties against whom deposition testimony is to be offered, stating the objections, and the grounds therefore, which counsel will assert at the trial to the deposition testimony.

(d) A list of witnesses, with their addresses, who will be called at the trial.

APPROVED AS TO FORM AND CONTENT:

JAMES W. JOHNSON, JR.
FREDERICK G. GIRARD

By: /s/ FREDERICK G. GIRARD
Attorneys for Plaintiff TCID

B. MAHLON BROWN, III
United States Attorney

SCOTT B. McELROY
Attorney, U.S. Dept. of Justice

By: /s/ SCOTT B. McELROY
Attorneys for Defendant Secretary of the Interior

ROBERT S. PELCYGER
ROBERT D. STITSER
MICHAEL R. THORP

By: /s/ MICHAEL R. THORP
Attorneys for Defendant-Intervenor
Pyramid Lake Paiute Tribe of Indians

ACTION BY THE COURT

(a) This case is set down for trial on October 29, 1979 at 10:00 A.M.

(b) Trial briefs shall be submitted to the Court on or before October 22, 1979.

(c) Court trials:

Proposed findings of fact and conclusions of law shall be filed on or before October 22, 1979.

The foregoing pretrial order has been approved by the parties to this action as evidenced by the signatures of

their counsel hereon, and the order is hereby entered and will govern the trial of this case. This order shall not be amended except by order of the Court pursuant to agreement of the parties or to prevent manifest injustice.

DATED: March 30, 1979.

BRUCE R. THOMPSON

UNITED STATES DISTRICT JUDGE

Appendix N: Order, District Court for the District of Nevada (Authorizing project diversions), United States v. Orr Water Ditch Co., In Equity No. A-3, filed January 15, 1985.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

ORR WATER DITCH COMPANY, et al.,

Defendants.

IN EQUITY NO. A-3 WEC

[Filed Jan. 17, 1985]

ORDER

On September 26, 1984, the Bureau of Reclamation, through the Department of the Interior, stopped diversions into the Truckee Canal for the Newlands Project. The Water Master has been requested by owners of water rights in the Newlands Project to begin diversions into the Truckee Canal pursuant to the terms of the Final Decree entered September 8, 1944, herein, for storage for use during the 1985 irrigation season.

GOOD CAUSE APPEARING THEREFOR, the Water Master, GARRY STONE, is hereby authorized to commence diversions to the Newlands Project pursuant to the Final Decree entered September 8, 1944.

DATED this 15th day of January, 1985.

/s/Walter E. Craig

DISTRICT JUDGE

Appendix O: United States' Memorandum in Support of Motion to Set Aside *Orr Ditch* Court's Order Authorizing Project Diversions, *United States v. Orr Water Ditch Co.*, In Equity No. A-3, Filed January 16, 1985

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ORR WATER DITCH COMPANY, et al.,

Defendants.

IN EQUITY NO. A-3

Filed January 16, 1985

[Attachments Omitted]

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION TO SET ASIDE WATER MASTER'S ORDER, FOR A PROMPT HEARING, AND FOR A STAY OF THE WATER MASTER'S ORDER PENDING A HEARING

The United States has been advised by the Water Master that he intends to divert water, or has ordered the diversion of water, from the Truckee River at Derby Diversion Dam into the Truckee Canal and thence into Lahontan Reservoir where it will be stored for later use by irrigators of the Newlands Irrigation Project. The Water Master originally intended to begin such diversions at 10:00 a.m. on January 14, 1985, but we are now advised that he intends to begin diversions on January 16, 1985. We are also advised that the Water Master's

order or intention has been ratified by an order of this Court.[1]

It is the contention of the United States that diversions of water from the Truckee River for storage in the Lahontan Reservoir are subject to the rules and regulations promulgated by the Secretary of the Interior. The Decree itself, in describing the rights to divert water at Derby Dam and through the Truckee Canal, provides:

> *** the plaintiff is entitled and allowed to divert, with a priority date of July 2, 1902, through the Truckee Canal 1,500 cubic feet of water per second flowing in the Truckee River for the irrigation of 232,800 acres of lands on the Newlands Project, for storage in the Lahontan Reservoir, for generating, power, for supplying the inhabitants of cities and towns on the project and for domestic and other purposes, *and under such control disposal and regulation as the plaintiff may make or desire*, provided that the amount of this water allowed or used for irrigation shall not exceed, after transportation loss and when applied to the land, 3.5 acre feet per acre for bottom lands, nor 4.5 acre feet per acre for bench lands under the Newlands Project.[2]

This Court, in a suit between the Truckee Carson Irrigation District (an irrigation district formed by the Newlands Project water users pursuant to state law and

---

[1] It is our understanding that the Water Master issued his order after a request was made by individual irrigators in the Newlands Irrigation Project. These irrigators, as beneficiaries of the Project, are subject to the federal regulations governing use of project water and cannot circumvent those regulations by invoking the authority of the Water Master. If these users have a complaint about the federal regulations, they should take it up with the Secretary of the Interior.

[2] Decree, pp. 10-11. A copy of these pages is attached as "Attachment I."

operating the Newlands Project pursuant to a contract with the Secretary of the Interior) stated as follows:

> TCID, however, contends that the Secretary exceeded his authority by issuing regulations which were in violation of the Orr Ditch Decree. The Orr Ditch Decree granted the United States the right to divert water from the Truckee River for irrigation of the project. This water is "under such control, disposal and regulation as the [United States] may make or desire." The only limitation on the Secretary's ability to regulate the water supply is an upper limit. Here, the Secretary issued a regulation reducing the amount of water to be diverted. Consequently the reduction was within the Secretary's authority.

Truckee-Carson Irrigation District v. Secretary of the Interior, Civil No. R-74-34 BRT, USDC Nev. (Aug. 17, 1983), p. 13, aff'd. ____ F.2d ____ (9th Cir. Sept. 10, 1984).[3] The Secretary's authority (and obligation) to issue regulations governing diversions for the Newlands Project has also been recognized in the case of *Pyramid Lake Tribe of Indians v. Morton*, 354 F.Supp. 252 (D. D.C., 1972). In that case, over which the district court has retained jurisdiction, the Secretary of the Interior is under court order not to modify his 1973 regulations, or Operating Criteria and Procedures, without the consent of the Pyramid Lake Tribe or the permission of the Court.[4]

The order of the Water Master directly conflicts with the order of the District of Columbia District Court enjoining storage in Lahontan Reservoir. In affirming the Water Master's determination, this Court recites as a basis the fact that the Bureau of Reclamation stopped

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[3] A copy of this unreported opinion is attached as "Attachment II."

[4] A copy of the order is attached as "Attachment III."

diversion to the Truckee Canal; the Bureau, however, stopped diversion to the Truckee Canal; the Bureau, however, stopped diversion based on Judge Gesell's Order on or about September 27, 1984.

The Secretary currently has Interim Operating Criteria and Procedures ("OCAP") in place that govern diversions from Derby Dam.[5] These interim OCAP do not permit the diversions contemplated by the Water Master and thus the Water Master's proposed diversions are in direct conflict with the Decree which he is to enforce. Further the Water Master's proposed diversion may place the Secretary under the threat of contempt proceedings by the United States District Court for the District of Columbia, since he is under orders from the Court not only to publish regulations but to actively enforce them.

> Under the provisions of the Decree [a]ny person feeling aggrieved by any action or order of the Water Master may in writing and under oath complain to the Court, after service of a copy of such complaint on the Water Master, and the Court shall promptly review such action or order and make such order as may be proper in the premises.

The orders and actions of the Water Master violate the sovereign rights of the United States as recognized in the Decree, by this Court in *T.C.I.D. v. Secretary, supra*, and by the District Court for the District of Columbia in *Pyramid Lake Tribe v. Morton, supra*. A stay of the Water Master's intended action would therefore be within the public interest. The threat of harm to the United States is immediate since the Water Master has stated he will begin diversions on January 16, 1985. The harm

---

[5] A copy of the interim OCAP is attached as "Attachment IV." The Secretary's 1973 OCAP of which the interim OCAP are a modification unsuccessfully challenged in *TCID v. Secretary, supra*.

threatened to the United States is irreparable since water once diverted is diverted forever. The United States, as shown by the discussion of the Decree, *T.C.I.D. v. Secretary*, and *Pyramid Lake Tribe v. Morton*, has a strong probability of success on the merits.

The United States therefore, in keeping with the provisions of the Decree, requests a prompt hearing on its objection to the Water Master's order and a stay of said order until such time as the United States may be heard and its objections considered.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Plaintiff's Motion To Set Aside Water Master's Order, For A Prompt Hearing, And For A Stay of The Water Master's Order Pending A Hearing, Memorandum in Support of Motion, and Proposed Order were mailed this 16th day of January, 1985, to the following parties:

Gary Stone
Federal Water Master
P. O. Box 3571
Reno, Nevada 89505

Frederick G. Girard
Kronick, Moskovitz, Tiedemann & Girard
770 L Street
Suite 1200
Sacramento, California 95814

Robert S. Pelcyger
Frederick & Pelcyger
1007 Pearl Street
Boulder, Colorado 80302

Roger H. Bergmann
One East Liberty Street
Suite 312
Reno, Nevada 89501

Michael R. Thorp
Eisenhower, Carlson, Newlands
Reha, Henriot & Quinn
1200 First Interstate Plaza
Tacoma, Washington 98402

FRED R. DISHEROON
Fred R. Disheroon

Office - Supreme Court, U.S.
FILED
MAY 9 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1233

(3)

In The

Supreme Court of the United States

October Term, 1984

TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner,

vs.

SECRETARY, DEPARTMENT OF THE INTERIOR,
Respondent.

vs.

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Respondent-Intervenor.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICHAEL R. THORP*
JAMES M. HUSHAGEN
EISENHOWER, CARLSON, NEWLANDS,
REHA, HENRIOT & QUINN
1200 First Interstate Plaza
Tacoma, Washington 98402
(206) 572-4500

ROBERT S. PELCYGER
FREDERICKS & PELCYGER
1881 - 9th Street, Suite 216
Boulder, Colorado 80302
(303) 443-1683

SCOTT B. MCELROY
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

*Counsel of Record**
Attorneys for Pyramid Lake Paiute Tribe of Indians

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

33pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals and the District Court were correct in upholding the decision of the Secretary of the Interior to terminate the 1926 contract which permitted the Truckee-Carson Irrigation District to operate the Newlands Project, because of the District's repeated violations of the Secretary's operating criteria for the Project.

2. Whether the Secretary of the Interior has the authority to promulgate operating criteria for a federal reclamation project where the operating criteria simply quantify total project water entitlement in accordance with existing court decrees and insure that water diverted to the Project is used for beneficial purposes.

3. Is the Secretary of the Interior foreclosed from implementing regulations governing the operation of the Newlands Reclamation Project merely because the Truckee-Carson Irrigation District was not a party to the lawsuit which was the impetus for adoption of certain aspects of the regulations.

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STATEMENT OF THE CASE

The present controversy between the Secretary of the Interior ("the Secretary") and the Truckee-Carson Irrigation District ("TCID") concerns the termination of a 1926 contract between the Secretary and TCID ("the contract"). The contract allowed TCID to operate the Newlands Reclamation Project but retained in the Secretary full authority to regulate Project operations. TCID further agreed to fulfill a number of specific obligations. It has not done so, requiring the Secretary to wage a lengthy and so far unsuccessful battle to compel TCID to abide by its obligations to improve Project efficiency and to limit water use on the Project to decreed amounts. Under his retained contractual authority, the Secretary has promulgated rules and regulations governing Project operations. Those rules, found at 43 C.F.R., part 418 require the adoption of annual operating criteria. Because the District adamantly refused to abide by the Secretary's operating criteria for 1973, which, among other things, included a 350,000 acre-foot total diversion limit, the Secretary terminated the 1926 contract.

1. The Regulatory Scheme on the Truckee River

The Secretary's efforts to improve the operation of the Newlands Project stemmed from the fact that TCID was diverting more water than allowed by the *Orr Ditch* Decree and the *Alpine* temporary decree and that limiting project diversions to decreed amounts, as well as improvement in project operations would result in additional flows to Pyramid Lake for the benefit of its devastated fishery.[1]

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[1]Pyramid Lake is surrounded by the Pyramid Lake Paiute Indian Reservation which was set aside in 1859. One of the purposes of the Reservation "was to enable the Tribe to take

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The majority of the Newlands Project is located on the lower reaches of the Carson River. Distribution of Carson River water is controlled by the terms of the decree in *United States v. Alpine Land and Reservoir Company*, D-183 (D.Nev.).[2] That decree imposes an annual water duty per acre for the individual water users on the Project. That duty governs the amount of water which

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advantage of the Pyramid Lake fishery . . ." United States v. Truckee-Carson Irrigation District, 649 F.2d 1280 (9th Cir. 1981) at 1290, *modified* 666 F.2d 351 (1982) *aff'd in part and rev'd in part sub nom* Nevada v. United States, 463 U.S. 110 (1983). Pyramid Lake's principal fish, the Lahontan cutthroat trout and the cui-ui, are classified as threatened and endangered. 50 C.F.R. § 17.11(h) (1983); United States v. Truckee-Carson Irrigation District, *supra*, 649 F.2d at 1294. The cui-ui is not found any place else in the world, *id.*, 649 F.2d at 1290, and the restoration of both species is dependent upon obtaining more water for spawning flows and to maintain the level of the Lake. *Id.*, 649 F.2d at 1292-94, 1311-13; Carson-Truckee Water Conservancy District v. Watt, 549 F. Supp. 704, 710-711 (D.Nev. 1982), 748 F.2d 523 (9th Cir. 1984), *cert. denied*, 53 U.S.L.W. 368 (Mar. 26, 1985).

[2]That case was filed in 1926 and has now been finally decided. United States v. Alpine Land and Reservoir Company, 503 F. Supp. 877 (D.Nev. 1980) *aff'd* 697 F.2d 851 (9th Cir. 1983), *cert. denied sub nom* Pyramid Lake Paiute Tribe of Indians v. Truckee-Carson Irrigation District, 78 L.Ed.2d 170 (1983). During the controversy over the operating criteria, the 1949 *Alpine* temporary decree, imposed an average water duty to be delivered to the farmers' headgate on the Newlands Project of 2.92 acre-feet per acre. TCID was a party to that litigation and in fact agreed to the terms of the temporary decree. The final *Alpine* decree recognized higher duties for the farmers, parallel to those in *Orr Ditch*. See n. 2, *infra*.

TCID cites the *Alpine* decision as holding that there is no waste of water on the Project. But the decision did not address the question of the efficiency of Project operations. Instead, it merely defined the amount of water which the Project farmers were entitled to have delivered to their farm headgates. The district court refused to address any of the United States' concerns about the wasteful project operations which result in inordinately high conveyance losses on the Project.

must be delivered to the farmers' headgates for each acre of land actually under irrigation on the Project. It does not address the question of conveyance or storage losses on the Project. Nor does it contain an individual or a Project diversion limit from the River.

The Newlands Project also uses Truckee River water diverted at Derby Dam on the Truckee River and transported through the Truckee Canal to Lahontan Reservoir where it is comingled with water from the Carson River for delivery to the Project lands. A small amount of water passing through the Truckee Canal is diverted for use on bench lands located below the canal.[3] The Project's use of water from the Truckee River is controlled by the decree in *United States v. Orr Water Ditch Company*, In Equity No. A-3 (D.Nev. 1944).[4] The *Orr Ditch* decree specifies an upper limit for the flows which may be diverted to the Project based on the capacity of the Truckee Canal. It does not provide any guidance in terms of annual diversion limits for the Project. The decree also imposes a maximum water duty for each acre of Project lands. Because of the lack of meaningful limits on the diversion of water by TCID for use on the Project, the Department of the Interior published 43

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[3]A map of the area is included in the decision in Pyramid Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D.D.C. 1973) at 259 (*"Tribe v. Morton"*).

[4]The *Orr Ditch* decree provides:

> The plaintiff [the United States] is entitled and allowed to divert, with a priority of July 2, 1902, through the Truckee Canal 1,500 cubic feet of water per second flow-in the Truckee River for the irrigation of 232,000 acres of land on the Newlands Project, . . . and under such control, disposal and regulation as the plaintiff may make or desire, provided that the amount of this water allowed or used for irrigation shall not exceed, after transportation loss and when applied to the land, 3.5 acre-feet per acre for the bottom lands, nor 4.5 acre-feet per acre for the bench lands.

C.F.R. part 418 in February 1967 to "initiate Departmental controls, lacking in the past, to limit diversions by TCID from the Truckee River within decreed rights and thereby make additional water available for delivery to Pyramid Lake."[5] 43 C.F.R. 418.1(b). The Secretary's regulations called for the establishment of annual operating criteria, which *inter alia* were to include diversion limits premised on the amount of water needed to provide the water duties found in the *Alpine* and *Orr Ditch* decrees to the water right acreage on the Project actually being irrigated in any given year. The operating criteria thus were to fulfill the requirement in the *Orr Ditch* decree for the imposition of Secretarial regulations governing Project diversions.

2. The History of the Operating Criteria

The present efforts to improve water use on the Project began in 1964, when Secretary Udall created a task force to address the problems of water use in the Truckee and Carson Basins. Tribe's Supplemental Excerpt of Record ("Tr. ER") 1. The Secretary published 43 C.F.R., part 418 to establish Departmental regulatory control over the Project in accordance with the terms of the *Orr Ditch* decree and the 1926 contract. The regulations established a comprehensive process for improving Project operations and went beyond imposing a diversion limit. The relevant terms of the regulations:

(1) mandated that "District operation of the irrigation works, including the diversion of water, shall be in compliance with all of the terms and pro-

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[5]The regulations had been published as proposed in August, 1966, 31 Fed. Reg. 113-14 (1966), and the Department of the Interior had held extensive discussions with the District concerning their substance. *See, e.g.*, Trial 1-30.

visions of the Truckee River Decree and the Carson River Decree . . .";

(2) established a committee to propose annual operating criteria for the coordinated operation of the Carson and Truckee Rivers;

(3) established a procedure for choosing an advisory committee of affected water users (which was to include a representative of TCID);

(4) imposed an upper limit of 406,000 acre-feet for the Newlands Project's annual diversions; uncontrollable spillage and evaporation from Lahontan Reservoir was not counted against this total;

(5) required certain measurements to be made by the District "through facilities and by methods satisfactory to the Secretary of the Interior . . .";

(6) stated that the United States may store water for the District in upstream facilities;

(7) prohibited the release of water from Lahontan Reservoir for single purpose power.

In 1967 the Secretary began issuing annual operating criteria. In 1970, the Pyramid Lake Tribe filed suit challenging the operating criteria for the upcoming water year.[6] Eventually, the District of Columbia court directed the Secretary to submit new criteria for the 1973 water year, which criteria were (1) to provide for an effective means to measure water use, (2) to minimize unnecessary waste, (3) to ensure the delivery of water only to water right land, and (4) to give proper weight to both the *Orr Ditch* decree and the *Alpine* temporary decree. *Tribe v.*

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[6]In its petition, TCID suggests that the filing of this litigation was the triggering event in the Secretary's efforts to control practices on the Project. But the Secretary had been engaged in such an effort for quite some time and had been in constant communication with the District about his plans. The litigation filed by the Tribe simply sought to compel the formulation of operating criteria which complied with the previously published regulations.

Morton, supra, 354 F. Supp. at 260. In addition, the district court ordered that the criteria include methods to ensure compliance.

On December 22, 1972, the Secretary prepared and submitted new criteria to the District of Columbia court. The criteria provided for:

(1) a maximum diversion of 358,000 acre-feet;
(2) sufficient water to irrigate 60,500 acres of land;
(3) the utilization of Stampede Reservoir to provide TCID with upstream storage on the Truckee River;
(4) an improved measurement scheme for farm turnouts and the outflow from the project;
(5) the establishment of a central water operations center to coordinate the delivery of water;
(6) a restriction on annual deliveries to the Carson Division to 3.5 acre-feet per acre;
(7) only authorized District employees to open and close turnouts and the distribution system.

Tr. ER 132.

The Tribe objected to the proposed criteria, primarily because the 2.92 acre-feet per acre water duty in the *Alpine* temporary decree was ignored and no provision was included which would provide financial incentives for the economical use of water. Tr. ER 154. The Tribe also questioned whether adequate compliance provisions were included. *Id.* The Tribe suggested that the criteria be amended to:

1. Establish a maximum diversion of 288,129 acre-feet. That limit was derived using the 2.92 acre-feet per acre diversion requirement in the *Alpine* temporary decree for 75% of the Carson division and a reduction to take account of the 5,000 acres of non-water right land being irrigated;
2. Establish a system for charging water users for the quantity of water used;

3. Add provisions to ensure compliance.

Tr. ER 187-197.[7]

Otherwise, the Tribe's proposed criteria were nearly identical to those prepared by the Secretary. *Compare* Tr. ER 132-139 *with* Tr. ER 198-210. Subsequently, the court asked the Secretary to comment on the Tribe's suggested provisions.

On February 20, 1973, the *Tribe v. Morton* court issued a supplemental order approving operating criteria contained in its order. The criteria which the court found acceptable directly reflected the comments of the Secretary. *See* Tr. ER 245-250. The Secretary had recommended a 350,000 acre-foot diversion limit for 1973 which was adopted. In addition, the portion of the criteria addressing compliance took account of the Secretary's view that he should not be compelled to terminate the contract in case of breach, but should be allowed to select the appropriate course of action only after all alternative were considered. *Compare* 354 F. Supp. 262-266 *with* Tr. ER 198-210. Section C of the criteria included the provisions from the Secretary's December criteria but added the Tribe's suggestion to establish a system for charging water users for the amount of water used.[8] The Secre-

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[7]The District commented on the criteria proposed by the Tribe in a letter to the Secretary's representative. Tr. ER 211.

[8]The 1926 contract formed the foundation for virtually all of the provisions of Section C of the operating criteria violated by the District and challenged below as outside the scope of Secretarial power. Paragraphs 7 and 34 recognized the Secretary's right to issue rules and regulations. Paragraph 13 established that the pricing system may be based on the amounts of water delivered. Paragraph 14 prohibited the delivery of water to non-water right land. The District was required by paragraph 20 to measure and keep records of water deliveries and to submit whatever reports are required by the Secretary. Paragraph 35 recognized the controlling nature of the *Orr Ditch* and *Alpine* decrees. App. A-47-88.

tary, consistent with the court's order, announced his intention for the following water year of 1974 to approve an annual limit of 288,129 acre-feet.[9] For 1974, he also included detailed procedures concerning the diversion of Truckee River water to Lahontan Reservoir.

The Secretary, of course, was free to appeal the *Tribe v. Morton* decision. Initially, the Department of the Interior recommended a limited appeal, but ultimately the federal government decided not to appeal anything other than the award of attorneys fees.[10] On Monday, March 12, 1973, the suggested criteria were published in the Federal Register.

TCID, rather than challenging the operating criteria through appropriate channels, simply refused to comply with them. TCID admitted delivering water to non-water right lands, allowing non-TCID employees to operate turnouts, failing to develop an adequate measuring sys-

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[9]The critical factor in the derivation of the 288,129 figure was the 2.92 acre-feet per acre water duty contained in the temporary decree in *Alpine*. The principle conflict in the *Tribe v. Morton* litigation was over the application of that limit. *See, e.g.*, 354 F. Supp. at 258. The United States and TCID were parties to the *Alpine* case and both were obligated to follow the terms of the temporary decree. "[P]ersons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the Order." GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375, 386 (1980).

[10]TCID argues, based on an April 30, 1973 letter from a staff attorney at the Department of Justice, that the Government's decision not to appeal was made by the Department of Justice and that the failure to appeal cannot be characterized as an "adoption" of the criteria. The record, however, does not demonstrate that the Secretary disagreed with the decision of his lawyers. Moreover, the Department of the Interior was not concerned with the criteria applicable in 1973, App. A-106, but was only concerned with the jurisdictional question of whether TCID was an indispensable party and the impact of the 1974 criteria which applied the *Alpine* limit. It willingly adopted the 1973 citeria. App. A-106-107.

tem, failing to charge for the amounts of water actually delivered and diverting water substantially in excess of the quantities allowed by the criteria. The court below specifically found that "TCID made no effort to reduce the diversion of water and comply with the operating criteria." The Secretary sent two compliance reports to TCID, which ignored them.

3. Termination of the Contract

On September 14, 1973, the Secretary notified TCID that, pursuant to Article 32, the 1926 contract would be terminated as of October 31, 1974. App. A-109. The letter cited the repeated violations of the criteria by TCID, specifically referring to excess diversions in June and September, which were admitted by TCID to have been in violation of the criteria. The Secretary also referred to TCID's August 21, 1973 letter which admitted its failure (1) to halt delivery water to non-water right land, (2) to establish a central water operations center, and (3) to establish an adequate measurement program. The Secretary's letter specifically cited the repeated efforts by the Department to advise the District of its concerns.

4. The Proceedings Below

TCID brought this action in March of 1974 to challenge the Secretary's decision to terminate the 1926 contract. The proceeding was held in abeyance pending resolution of *Alpine* and *Nevada v. United States, supra.* After a four day trial, the district court declared "that the Secretary of the Interior has legally terminated the contract dated December 18, 1926, and has a lawful right to possession and control of the Newlands Reclamation Project effective as of November 1, 1974." App. A-32. In reaching this decision, the District Court made a number of critical factual findings now overlooked by TCID.

First, the District Court found that the testimony of TCID's own project manager substantiated the statement in its complaint that TCID "has refused and continues to refuse to comply with the so-called 'operating criteria' . . ." App. A-13. As stated by the District Court, "Richard Lattin, a member of the Board of Directors of TCID, appeared on behalf of TCID and testified to numerous violations of the operating criteria." *Id.* These violations included the delivery of water to non-water right lands, allowing non-TCID employees to operate turn outs, failing to develop an adequate measurement system, failing to charge for the amounts of water actually delivered, and diversions in excess of the quantities allowed by the criteria. The District Court also found that the administrative record substantiated TCID's violations of the criteria. App. A-14. The court specifically held that "TCID made no effort to reduce the diversion of water and comply with the operating criteria." *Id.* In addition to the excess diversions, the court found that the administrative record substantiated the violations of Section C of the criteria noted by its project manager and that TCID failed to submit the monthly reports required by the criteria. App. A-14. Finally, the court noted that the Secretary sent two compliance reports to TCID which failed to heed the warnings. App. A-14.

Second, the District Court reviewed the validity of the operating criteria and concluded that "TCID has provided no evidence which would indicate that relevant factors were not considered or that the criteria approved by the court were clearly errors of judgment." App. A-24. The court denied TCID's claim that the Administrative Procedure Act, 5 U.S.C. §§ 701-706, was violated and found the criteria to be "valid and enforceable" regulations. App. A-29. Finally, the District Court found the operating cri-

teria to "clearly fall within the ambit of Secretarial power to prescribe rules and regulations under the 1926 contract." App. A-30.

The Court of Appeals affirmed. The appellate court concluded that the Secretary acted within his authority when he terminated the 1926 contract. The Court of Appeals also examined the operating criteria and found them to be neither arbitrary nor capricious. In the view of the court it was unnecessary to go beyond TCID's admitted violation of the diversion limits to justify the Secretary's decision to terminate the 1926 contract. Finally, isasmuch as the result of termination was simply to terminate TCID's management of the Project, the Court of Appeals found that the question of the impact of the criteria on project landowners raised no due process concerns.

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REASONS FOR DENYING THE WRIT

This case, contrary to TCID's representations, does not diminish in any way the water rights of the Project farmers decreed in *Orr Ditch* and in *Alpine*. Neither does this case "unsettle" any rights confirmed in *Nevada v. United States*, since the challenged criteria simply govern the amount of water which must be diverted to provide Project farmers with the water duties established by those decrees. Instead, the sole issue in this case is whether the Secretary acted properly in terminating the 1926 contract as a result of TCID's repeated violations of the operating criteria. None of the reasons suggested by TCID merit review by this Court of the decision which was correctly decided and which has no impact other than precluding TCID from operating the Project under the now terminated 1926 contract.

I. The Decision Below Is Fully Consistent With Nevada v. United States And Does Not Adversely Affect The Rights Recognized In Orr Ditch And Alpine.

TCID is misleading in claiming that the operating criteria "indisputably invade and drastically reduce" the farmers' *Orr Ditch* rights and that the Ninth Circuit's decision has "reinstate[d] the same decision which this Court reversed in *Nevada.*" In fact, the operating criterit do not diminish the Project farmers' water duty at all, and the Ninth Circuit's decision has no effect on the rights to appropriated water recognized in *Nevada v. United States.*

TCID would have this Court believe that, because the operating criteria result in reducing the amounts of water diverted below historical quantities and causing more water to reach Pyramid Lake, the Project farmers' water rights are somehow being invaded. The *Orr Ditch* and *Alpine* decrees establish the farmers' water duties; *e.g.*, the maximum amounts of water which may be delivered to each acre of water right land on the Project. The operating criteria do not affect this water duty; they only determine the maximum volume of water that may be diverted to provide the required water duties. Prior to the operating criteria, TCID had diverted far more water than was necessary to satisfy the farmers' *Orr Ditch* rights. The operating criteria were intended to reduce the volume of water diverted but in no way were designed to diminish the farmers' water duty.

The fact that reduced diverisons would result in more Truckee River water flowing into Pyramid Lake does not mean that the Tribe is receiving "ten times the amount [of water] awarded the tribe in *Orr Ditch.*" TCID Peti-

tion at 14. Rather, as the terminus of the Truckee River, Pyramid Lake is the indirect beneficiary of the Secretary's decision to hold the farmers to no more than their *Orr Ditch* rights. Water which is not diverted then becomes unappropriated water which flows to Pyramid Lake.[11]

Both the District Court and the Court of Appeals held that the operating criteria are consistent with the decrees in *Orr Ditch* and *Alpine*.[12] The *Tribe v. Morton* court explicitly recognized that the criteria implemented by the Secretary could not interfere with the rights recognized in the *Orr Ditch* and *Alpine* decrees. 354 F. Supp. at 260. *See also* App. A-6, n. 2. The District Judge in this case specifically found that the *Orr Ditch* decree permitted the Secretary to impose regulations which limited the District's diversions from the Truckee River, as long as Project farmers receive the water duties to which they are entitled.[13] App. A-23-24. The Court of Appeals affirmed. App. A-6, A-9.

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[11]The footnote to the concurring opinion in Nevada v. United States, *supra*, states that the Tribe retains its *Winters* rights in this unappropriated water.

[12]As previously noted, at the time the 1973 operating criteria were in effect, the water duty on the Carson River was governed by the temporary decree which provided an average of 2.92 acre-feet per acre on the Newlands Project. The final decree recognized higher limits which parallel those in the *Orr Ditch* decree. Accordingly, the United States is now in the process of modifying the operating criteria to reflect the revised water duty as well as any additional information about the Project which may have surfaced. As a result, it is unlikely that the 1973 criteria about which TCID is now so concerned will ever be enforced agains the Project farmers. As TCID points out, any modifications to the criteria will have to be approved by the *Tribe v. Morton* court, which has now transferred that case to the District of Nevada.

[13]It is worth noting that Judge Thompson, who decided this case, is the same judge who decided *Alpine* and who wrote the final decree in that case. In addition, for many years

The 1973 criteria certainly did not infringe on the rights of the individual Project water right holders. Although TCID continues to complain about the diversion limits in the 1973 criteria, its project manager testified at trial that adherence to the 1973 criteria at the efficiency levels achieved in 1973 would have permitted substantially more water to be delivered to Project farmers than in previous years.[14]

TCID's only basis for contending that the 1973 criteria detrimentally affected the water rights of Project farmers is the subsequent recognition of a slight increase in water duty in the *Alpine* final water duty. But, unquestionably, the lower 2.92 acre-feet per acre duty represented a valid and binding court order during 1973 and 1974 when the criteria were in effect. The Secretary cannot be criticized for implementing criteria which recognized the provisions of the *Alpine* temporary decree. If TCID was dissatisfied with the provisions of the temporary decree in *Alpine*, it was free to move for a modification of those provisions to which it had previously agreed.

In short, the record simply does not support TCID's bald assertion that the 1973 operating criteria infringed on the farmer's water rights recognized in the *Alpine* and *Orr Ditch* decrees and confirmed in *Nevada v. United States, supra.* Instead, it is aboundantly clear that the

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Judge Thompson was responsible for administering the *Orr Ditch* decree. His views on this matter, as one extremely familiar with both of those decrees, should be entitled to considerable weight.

[14]According to TCID's Project Manager, Mr. Lattin, TCID's actual efficiency level in 1973 would have permitted TCID in 1973 to deliver to its farmers at their headgates approximately 7,000 acre-feet more water than it had in the previous two years and 13,000 acre-feet more than the average for the past 12 years. RT 86.

criteria were premised on the water duty established in *Alpine* and *Orr Ditch*. As a result, TCID's imagined conflict between *Nevada v. United States, supra,* and the decision below simply does not exist. *Nevada* merely confirmed the *Orr Ditch* rights awarded to Project farmers; it did not grant unlimited and unrestricted rights to divert water from the Truckee River, nor did it destroy the Secretary's obligation to limit TCID diversions to decreed amounts.

II. The Decision Below Does Not Affect The Substantive Rights Of The Newlands Project Farmers.

TCID is also incorrect in claiming that the Ninth Circuit's decision conflicts with *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333 (1977), because the Court of Appeals held that TCID lacked standing to assert the water rights of the Project farmers. This assertion is flatly wrong because only TCID's right to operate the Project, not the farmers' rights to water, are in issue in this case.

As pointed out above, the Ninth Circuit's decision upholding the operating criteria in no way diminishes any vested water rights of Newlands Project farmers under the *Orr Ditch* and *Alpine* cases. Even assuming such infringement, however, these rights are not in issue in this case. Rather, the issue is TCID's right to operate the Newlands Project in light of the Secretary's termination of the 1926 contract. Whether or not TCID operates the Project, the rights of the farmers remain precisely the same as before. The farmers arguably retain a right to challenge the operating criteria if the Secretary's operation of the Project infringes on their decreed rights. Thus, the question of the impact of the criteria on the farmers' rights causes no constitutional concern.

TCID's reliance on *Hunt* for a contrary position is misplaced. In *Hunt,* this Court held that a state agency established to promote a particular industry had standing to represent members of the industry where the members' rights were in issue. Here, in contrast, the question of the rights of the Newlands farmers are not before the Court. The sole question is whether TCID should be allowed to operate the Project subsequent to TCID's flagrant breach of the Secretary's criteria. Accordingly, *Hunt* has no bearing on this action.

III. The District Court And The Court Of Appeals Correctly Held That The Criteria Were A Valid Exercise Of The Secretary's Authority.

TCID consistently ignores the fact that both the District Court and the Court of Appeals scrutinized the operating criteria. Indeed, the district judge devoted a considerable portion of his opinion to the question of the validity of operating criteria and found them to be a proper exercise of secretarial authority. He specifically found that the criteria, including the diversion limits, were consistent with the *Orr Ditch* decree and concluded that "relevant factors were considered and that no error of judgment was made." App. A-23-24. Although the district judge reviewed the criteria under the standards of *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416 (1971), he conducted a trial *de novo* over the objections of the Tribe and the United States, who contended that the evidence should have been limited to the administrative record. Despite being given such a free hand, TCID was unable to convince the District Court that the criteria were improper or outside the scope of Secretarial power. The Court of Appeals affirmed. App. A-9.

The lower courts were correct. The provisions of Section C of the criteria—which TCID admitted violating —are aimed at improving efficiency on the Project and directly implement the terms of the 1926 contract, virtually tracking that agreement word-for-word. Even a cursory glance at the language of the *Orr Ditch* decree, which contains only a water duty for each acre and no diversion limit, reveals the absolute necessity for the secretarial regulations which *Orr Ditch* expressly authorizes. As the District Court found, a limit on diversions is necessary if there is to be any restraint on the water diverted by TCID. App. A-24. The results of TCID's refusal to follow the 1973 criteria confirm the need for such restrictions. During the pendency of this litigation, TCID's disregard of the 1973 criteria resulted in an average annual loss of over 46,000 acre-feet of water because of spills, unnecessary releases, and unnecessary evaporation which would not have occurred if the 1973 criteria had been in effect. *See* Exh. 3 to the Tribe's opposition to TCID's Request for a Stay Pending Appeal before the Ninth Circuit.

TCID argues that the criteria, even if properly promulgated, exceeded the Secretary's authority to the extent that Project diversion were limited.[15] Neither of the lower courts were persuaded by TCID's complaints that the Secretary was not authorized to limit project diversions. First, such an argument flies directly in the face of the language of the *Orr Ditch* decree which expressly provided for secretarial regulation. Likewise, the Secretary explicitly reserved the right in paragraph 34 of the 1926

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[15]TCID makes no mention of the other portions of the criteria which it violated and apparently concedes, as it should, the Secretary's authority to impose such requirements.

contract to issue rules and regulations governing the operation of the Project.

The reclamation laws authorize the Secretary to enter into contracts with water users' associations such as TCID to permit such districts to take over the operation and maintenance of project facilities. *See* Section 4(G) of the Fact Finders Act of December 5, 1924, 43 Stat. 702, 43 U.S.C. § 500. These laws vest broad discretionary authority in the Secretary to negotiate, administer and enforce the terms and provisions of these contracts. They also require the Secretary to promulgate and enforce rules and regulations to ensure the beneficial use of water on the projects.

In promulgating 43 C.F.R., part 418, the foundation for the challenged 1973 criteria, the Secretary did not simply rely on his authority under reclamation law, but also referred to his fiduciary obligations to the Pyramid Lake Tribe, *see, e.g., United States v. Mitchell,* 103 S.Ct. 2961, 2972 (1983) and his responsibilities under the Washoe Project Act of 1956, 43 U.S.C. § 614 *et seq.,* to restore the Pyramid Lake fishery. *See United States v. Truckee-Carson Irrigation District, supra,* 649 F.2d at 1311-12; *Carson Truckee Water Conservancy District v. Watt, supra,* 549 F. Supp. at 707.[16] These authorities provide ample support for the criteria which TCID now challenges.

TCID seeks to avoid the Secretary's obligations outside of reclamation law by reference to the decision in *Nevada v. United States, supra,* claiming that that decision eliminates the Secretary's obligation to the Tribe to ensure that water uses and methods of operation on the

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[16]If those regulations were promulgated today, the Secretary would also need to consider his obligations under the Endangered Species Act, 16 U.S.C. § 1532 et seq.

Project are reasonable and do not result in the excessive use of water. But *Nevada v. United States* does not eliminate the Tribe's or the federal government's interest in seeing that users of Truckee River water do not exceed their decreed entitlements. As the Tribe's trustee, the Secretary was responsible for protecting the Tribe's interests. The fact that this Court held that res judicata barred the Tribe from claiming rights with a priority over TCID's rights does not mean TCID has a right to divert water free from any limits or that the Secretary need not act to limit TCID's diversions to reasonable amounts and to require efficient operation of the Project.[17]

IV. TCID's Argument That The Operating Criteria Were Fatally Flawed Because TCID Was Not A Party To Tribe v. Morton Is Specious.

Having failed to persuade any of the four judges who reviewed the matter that the 1973 criteria exceeded the permissible scope of Secretarial authority or reflected an error of judgment, TCID now argues that the circumstances surrounding their adoption by the Secretary rendered them fatally flawed, whatever the merits of their content. TCID contends that the *Tribe v. Morton* court overstepped its bounds in "formulating" the 1973 criteria "adopted" by the Secretary rendering the criteria "void." TCID Petition at 19. TCID next argues that, despite the scrutiny of the criteria in the present case, requiring TCID to abide by criteria stemming from *Tribe v. Morton* would violate due process since TCID did not participate in that

[17]Subsequent to the decision in Nevada v. United States, this Court recognized the Tribe's continuing interest in limiting the use of water on the Newlands Project when it permitted tribal intervention to seek a writ of certiorari in *Alpine*. Pyramid Lake Paiute Tribe of Indians v. Truckee-Carson Irrigation District, 78 L.Ed.2d 170 (1983).

litigation. The courts below properly found no basis for those contentions.

First, TCID seriously mischaracterizes the proceedings in *Tribe v. Morton*. Contrary to TCID's argument, the criteria adopted by the Secretary reflected his views on the subject. As the record below clearly shows, *see* pp. 6-8, *supra*, it was the Secretary who first suggested virtually all of the provisions found in the 1973 criteria approved by the *Tribe v. Morton* court. The provisions of the 1973 criteria merely implement the Secretary's concerns set forth in the 1967 regulations. It is undisputed that the Secretary first included in the criteria the provisions in Section C that water only be delivered to water right land, that TCID establish a single water operations center, that only TCID employees open and close turnouts, that outflow from the Project be measured, that measurements on the Project be improved, and that a monthly report be provided. *See* Tribal ER at 100. The district judge in this case found that TCID had violated each of those provisions. App. A-13, 14.

The only place in the criteria where the imprint of the *Tribe v. Morton* court is reflected at all is in the diversion limits. The court determined, contrary to the Secretary's position that as a matter of law the Secretary was required to give effect to the *Alpine* temporary decree. *See* 354 F. Supp. at 257-58. But that only affected the post-1973 criteria; the 1973 criteria reflected the 350,000 acre-feet developed by the Secretary as a transition limit. 354 F. Supp. 261; Tr. ER 246. Moreover, the diversion limit depended directly on the resolution of the legal question of the applicability of the *Alpine* decree. The district court, under 5 U.S.C. § 706, was entitled to "decide all relevant questions of law" and "compel agen-

cy action unlawfully withheld . . . ." *See Northeast Marin Terminal Co. v. Caputo,* 432 U.S. 249 (1977); *Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.,* 103 S.Ct. 2622 (1983).

At any rate, this case involves a challenge to the termination of the 1926 contract. The District Court plainly held that the Secretary decided to terminate the contract and that he was not compelled to terminate by the terms of the operating criteria. TCID's contrary assertion here that the District Court found that the *Tribe v. Morton* court mandated the Secretary's decision to terminate is extremely surprising, *see* TCID Petition at 20, since before the Court of Appeals TCID expressly sought to overturn the District Court's determination that the Secretary decided to terminate the contract, calling the District Court's statements to that effect "nothing short of fanciful." TCID Brief before the Court of Appeals at n. 21. Before the Court of Appeals, TCID stated "Implicit in the district court's decision is a factual determination that the Operating Criteria and their enforcement were the product of an exercise of Secretary discretion and are therefore reviewable as administrative acts." *Id.* It is obvious that the District Court held that the Secretary decided to terminate the contract and that the record fully supports that holding. App. A-11; App. A-14; App. A-24; App. A-32.

In fact, the Secretary did not terminate the contract at TCID's first violation, but took that step only after TCID repeatedly violated the criteria. Furthermore, the Secretary surely did not believe he was compelled by court-imposed criteria to terminate the contract since he considered other options before deciding to invoke paragraph 32 of the contract. ER 351-359, 375-378. TCID's

"attitude of complete defiance" left the Secretary with no choice but to terminate the contract. App. A-31.

Stated succinctly, TCID's argument fails because its underlying premise is incorrect; the *Tribe v. Morton* court simply did not dictate the terms of the 1973 criteria as TCID contends. The criteria set forth in the court's order are the product of a lengthy process, conveniently ignored by TCID, in which the Secretary, under the court's supervision, finally came to recognize the proper scope of his responsibilities on the Truckee River.

Even assuming that some foundation exists for TCID's concerns with the actions of the *Tribe v. Morton* court, TCID may not now mount a collateral attack on that decision. TCID's contentions, if accepted, would permit any entity subject to regulations published after judicial review to challenge those regulations on the ground that the reviewing court acted improperly, whether or not the resulting regulations themselves were improper or outside the scope of the agency's authority. As the Court of Appeals noted, the Secretary was the one to contest the actions of the *Tribe v. Morton* court. App. A-8. By not appealing the trial court's decision in that case, the Secretary effectively adopted the outcome as his own. Neither the District Court nor the Court of Appeals foreclosed TCID from attacking the criteria. Both held, however, that the criteria withstood TCID's challenges.

Unable to upset the criteria on their merits, TCID now demands more. The District argues that it should be allowed in this case to attack the decision in *Tribe v. Morton,* as exceeding the jurisdiction of that court. TCID could have intervened in *Tribe v. Morton,* or it could have moved to set aside the temporary decree in *Alpine,* given its dissatisfaction with the criteria's reliance on the water

duty in that decree. It did neither, but instead seeks in this case to determine whether the *Tribe v. Morton* court exceeded its authority. Without discussion, TCID cites to *United States v. SCRAP,* 412 U.S. 669 (1973); *Arrow Transportation Co. v. Southern R.R. Co.,* 372 U.S. 658 (1963); and *Cherokee Nation v. State of Oklahoma,* 461 F.2d 674, 681 (10th Cir. 1972), *cert. denied,* 409 U.S. 1039 (1972), as support for its novel position. These cases, however, do not stand for the proposition that a party may invalidate regulations which arose out of litigation on the grounds that the reviewing court exceeded its authority under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* Rather than condoning a collateral attack on the outcome of litigation, those cases all involved a direct attack on the court actions in question, raised by parties to the actions: TCID has cited no authority for its unique proposition that one who is not a party to litigation may in a subsequent case raise the question whether in the previous litigation, a court exceeded its authority in supervising the promulgation of regulations.

The *Tribe v. Morton* decision represented a final and binding resolution of the controversy between the Secretary and the Tribe concerning the scope and content of the Secretary's criteria for the operation of the Newlands Project. Neither party appealed and neither party may avoid the outcome. TCID contends that, nevertheless, it is free in this case to nullify the *Tribe v. Morton* decision if, in fact, that court overreached its authority in directing the promulgation of regulations consistent with the Secretary's fiduciary obligations to Tribes.[18] To the con-

[18]It may be that the Tribes' failure to join TCID in *Tribe v. Morton* and the Government's refusal to appeal the district

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trary, this Court has always been extremely protective of the right of courts to ensure that their decisions are not upset by the actions of third parties. For example, the Court has endorsed the use of injunctive powers against third parties where the actions of those parties interfered with the implementation of court orders establishing public rights. *Washington v. Washington State Commercial Passenger Fishing Vessel Association,* 443 U.S. 658, n. 32 (1979), upheld the district court's actions in enjoining individual fishermen who were not parties to its decisions from interfering with the implementation of the decision. In *United States v. Hall,* 472 F.2d 261 (4th Cir. 1972), cited with approval in *Fishing Vessels Association* and *Golden State Bottling Co. v. NLRB,* 414 U.S. 168 (1973), the Court refused to overturn the district court's use of its contempt powers against a nonparty whose actions interfered with the implementation of the court's school desegregation orders. *See also United States v. United Mine Workers,* 330 U.S. 258, 293

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court's refusal to dismiss as a result of that failure means that TCID is not precluded from challenging the criteria themselves rather than the judgment in *Tribe v. Morton.* Although not addressed by the Ninth Circuit, a strong argument exists that TCID is in privity with the Secretary and thus is foreclosed from challenging the criteria at all. In Nevada v. United States, *supra* this Court held that the effect of the earlier adjudication in *Orr Ditch* barred the United States and the Pyramid Lake Tribe from asserting a fishery water right with an 1859 priority date against Newlands Project farmers, *Orr Ditch* water right holders and subsequent appropriators who had relied on the *Orr Ditch* decree. The Court stated "TCID, like the Tribe, stands with respect to that litigation in privity with the United States." 77 L.Ed.2d at 529. The Court thus concluded that the Tribe and the Project landowners, although neither were parties, were bound by the final decree in *Orr Ditch.* Similarly, TCID should be precluded from challenging the decision in *Tribe v. Morton,* since it is in privity with the Secretary by virtue of the 1926 contract.

(1947). A refusal to invalidate the 1973 criteria because TCID did not participate does not begin to approach the limits suggested by those cases since TCID was allowed to attack the criteria on their merits.

The lower courts were correct in refusing to endorse TCID's challenge in this case to the *Tribe v. Morton* court's supervision of the promulgation of the criteria. TCID's concerns with the actions of that court should have been raised in that forum. This Court's holding in *GTE Sylvania, Inc. v. Consumers' Union,* 445 U.S. 375 (1980), is instructive in this regard. In *Sylvania,* this Court held that the Consumer Product Safety Commission was not "improperly" withholding information under the Freedom of Information Act since it was subject to an injunction, in another case, barring disclosure. The requesters in *Sylvania* contended, *inter alia,* that the CPSC could not rely on that court order since the requesters had not been parties to that case. This Court reasoned:

> The conclusion that the information in this case is not being "improperly" withheld is further supported by the established doctrine that persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order . . . There is no doubt that the Federal District Court in Delaware had jurisdiction to issue the temporary restraining order and preliminary and permanent injunctions. Nor were those equitable decrees challenged as "only a frivolous pretense to validity." *Walker v. City of Birmingham* [388 U.S.] at 315, although of course there is disagreement over whether the District Court erred in issuing the permanent injunction. 445 U.S. at 386. (citations and footnote omitted).

That same reasoning applies here. The Secretary had no choice but to implement regulations consistent with the

orders of the *Tribe v. Morton* court. TCID, like the requesters in *Sylvania,* was burdened by the outcome of a suit in which it did not participate. TCID's recourse, if it did not agree with the Secretary's actions in *Tribe v. Morton,* was to intervene in that action, not, to ignore the Secretary's criteria. *See O'Burn v. Shopp,* 70 FRD 549, 552 (E.D. Pa. 1976), *aff'd. mem.* 546 F.2d 418 (3d Cir. 1976), *cert. denied,* 430 U.S. 968 (1977) ("We cannot accept plaintiffs' proposition that *Hansberry* allows any third person an unqualified right to collaterally relitigate the merits of a judgment in a prior suit. Under such circumstances, courts could never enter a judgment in a lawsuit with the assurance that the judgment was a final and conclusive determination of the underlying dispute.").

TCID is also mistaken regarding its assertions that the promulgation of the criteria denied it due process. TCID vehemently criticizes the Court of Appeals for failing to consider the potential impact of the criteria on the rights of the individual farmers. TCID again ignores the fact that its own testimony was that the criteria provided the farmers with more water than they had received in past years.

Even assuming *arguendo* that the criteria adversely affected the farmers, the Court of Appeals was correct in refusing to address TCID's due process concerns in the framework of the individual landowners water rights. Before the Court of Appeals, TCID argued only that "Termination of TCID's operating contract constituted enforcement of a court order against a non-party in violation of due process of Law." TCID's concern was that the *Tribe v. Morton* court had mandated termination and, thus, that the Secretary's actions were, in effect, the enforcement of a court order against a party who did not participate in the litigation. Brief of Truckee-Carson Ir-

rigation District, Appellant at 17, 22. As previously pointed out, the District Court found that the Secretary had decided to terminate the contract. Given the fact that TCID only challenged on due process grounds the termination decision, the Court of Appeals found it unnecessary to address the question of whether the criteria unconstitutionally infringed on the farmers' rights. The court reasoned that since the only enforcement actions taken by the Secretary, *i.e.*, termination of the 1926 contract, did not affect the individual farmers whose water rights remained precisely the same as before, the question of the impact of the criteria on the farmers' rights raised no constitutional concerns vis-a-vis TCID. Thus, TCID was entitled to no more than an *Overton Park* review of the criteria and their impact on the farmers.

As its last gasp, TCID argues that both the District Court and the Court of Appeals misinterpreted the Truckee River Agreement ("TRA") and that this Court should accept this case to review that narrow question concerning the administration of the Truckee River. The lower courts were correct in rejecting this novel interpretation of the TRA which would render meaningless the detailed provisions of the *Orr Ditch* decree. The testimony at trial was that no other entity interprets the TRA in the fashion that TCID requests. RT 319-21. Moreover, that interpretation is not even utilized by the District in its day-to-day operation of the Project. RT 93-94.[19]

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[19]A far more viable interpretation of Article VII of the TRA is readily apparent. That interpretation centers on the fact that among the parties to the TRA who take water under Article VII, the TCID diversions at Derby Dam for the Newlands Project are

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farthest downstream. Hence, Article VII (A)(2) is intended sim-

CONCLUSION

In conclusion, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL R. THORP*
EISENHOWER, CARLSON, NEWLANDS,
REHA, HENRIOT & QUINN

ROBERT S. PELCYGER
FREDERICKS & PELCYGER

SCOTT B. MCELROY
NATIVE AMERICAN RIGHTS FUND

*Counsel of Record**
Attorneys for Pyramid Lake
Paiute Tribe of Indians

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ply to permit TCID to divert that water which, for whatever reason, is not utilized by the upstream signatories and is needed on the Project to meet decreed rights. Quite obviously, the upstream users cannot divert that water once it reaches as far downstream as Derby Dam. The accomplishment of that limited objective does not require the rejection of the provisions of the *Orr Ditch* decree or the suspension of federal reclamation law or state law requiring that water only be diverted for beneficial uses. Likewise, that interpretation does not necessitate the conclusion that the Secretary lacks authority under the 1926 contract to regulate the use of Project facilities for the delivery of that water.

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No. 84-1233

In the Supreme Court of the United States

OCTOBER TERM, 1984

TRUCKEE-CARSON IRRIGATION DISTRICT, PETITIONER

v.

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

REX E. LEE
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

PETER R. STEENLAND, JR.
DIRK D. SNEL
ALBERT M. FERLO, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Secretary of the Interior properly terminated a 1926 Contract with petitioner that authorized it to operate the Newlands Reclamation Project, on the ground that petitioner violated operating criteria and procedures promulgated by the Secretary pursuant to authority expressly reserved in that contract.

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BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 742 F.2d 527. The opinion of the district court (Pet. App. A11-A32) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1984, and the petition for rehearing was denied on October 31, 1984 (Pet. App. A35). The petition for a writ of certiorari was filed on January 29, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an irrigation district organized under state law as a political subdivision of the State of Nevada. Within its territorial boundaries are

lands owned by farmers and others entitled to receive water from the Newlands Reclamation Project. Water for the Project is drawn from the Truckee and Carson Rivers. The Truckee River terminates in Pyramid Lake, "a desert lake 20 miles long and five miles wide, with no outlet and a water level determined by the balance or imbalance between inflow and evaporation." *United States* v. *Nevada*, 412 U.S. 534, 536 (1973). Newlands Project water is diverted from the Truckee at Derby Dam, upstream from Pyramid Lake, and conducted through the Truckee Canal to Lahontan Reservoir on the lower Carson River. There, the "combined waters of the Truckee and Carson Rivers * * * are distributed for irrigation and related uses on downstream lands by means of lateral canals within the Newlands Reclamation Project." *Nevada* v. *United States*, 463 U.S. 110, 116 (1983). Pyramid Lake and adjacent lands comprise the Pyramid Lake Indian Reservation, which was established in 1859 and is currently occupied by the respondent Pyramid Lake Paiute Tribe of Indians.

Rights of Newlands Project water users to Truckee River waters are governed by the *Orr Ditch* decree, the final decree entered in 1944 in *United States* v. *Orr Water Ditch Co.*, Equity No. A-3 (D. Nev. Sept. 8, 1944). See *Nevada* v. *United States*, 463 U.S. at 116-118. Under the *Orr Ditch* decree, the amount of water allowed or used for irrigation shall not exceed 3.5 acre feet per acre (afa), after transportation loss, for bottom lands and 4.5 afa for bench lands (E.R. 38-39),[1] and no diversion is permitted except in the amount reasonably necessary for "economical and

[1] "E.R." refers to the Excerpts of Record filed by petitioner in the court of appeals.

beneficial use" (E.R. 115). Rights of the Project water users to Carson River waters now are governed by the *Alpine* decree, the final decree entered on December 18, 1980 in *United States* v. *Alpine Land & Reservoir Co.*, 503 F. Supp. 877 (D. Nev. 1980), aff'd as modified, 697 F.2d 851 (9th Cir. 1983), intervention granted and cert. denied *sub nom. Pyramid Lake Paiute Tribe of Indians* v. *Truckee-Carson Irrigation Dist.*, 464 U.S. 863 (1983). That decree also provides for a maximum of 3.5 afa and 4.5 afa, provided such amounts are necessary for beneficial use. 503 F. Supp. at 881. However, when this suit arose, Carson River water rights were governed by a temporary decree entered in *Alpine* on March 24, 1950, which provided for a maximum irrigation water use of 2.92 afa. Tribe Supp. E.R. 211.

2. a. On December 18, 1926, as authorized by the Reclamation Act of 1902, 43 U.S.C. 371 *et seq.*, and by Sections 23 and 45 of the Omnibus Adjustment Act of 1926, ch. 383, 44 Stat. 641, 648, the United States, through the Secretary of the Interior, entered into a Contract with petitioner (Pet. App. A36-A74). That Contract provided for petitioner to manage and operate the facilities constructed by the United States that comprise the Newlands Project (Arts. 6-7, Pet. App. A44-A45) and for petitioner to assume the obligation (theretofore imposed on individual landowners entitled to receive Project water) to repay the United States for construction costs of the Project (Arts. 9-14, Pet. App. A48-A54; see also Pet. App. A145). Article 34 of the Contract provided (Pet. App. A66):

> The Secretary reserves the right, so far as the purport thereof may be consistent with the provisions of this contract, to make reasonable rules

> and regulations, and to add to and modify them as may be deemed proper and necessary to carry out the true intent and meaning of the law and of this contract, and [petitioner] hereby agrees that in the operation of the transferred works, all such rules and regulations will be fully adhered to.

Similarly, in Article 7 of the 1926 Contract, petitioner agreed to operate the Project works and deliver water therefrom "in full compliance with the National Reclamation Laws, as said laws now exist or as they may hereafter be amended or supplemented, court orders and decrees, contracts heretofore entered into between the United States and various persons for the delivery of water, the terms and conditions of this agreement, [and] the rules and regulations of the Secretary now in force or hereafter promulgated" (Pet. App. A45). Article 32 empowered the United States, upon one year's notice, to terminate the contract for "breach of any of [its] * * * terms or conditions" (Pet. App. A65).

b. As provided in Article 34 of the 1926 Contract, quoted above, the Secretary, on August 26, 1966, published proposed rules in the Federal Register designed to guide the operation and control of the Project. 31 Fed. Reg. 11314. On February 21, 1967, the Secretary adopted final regulations. 32 Fed. Reg. 3091. The basic regulations were not challenged by petitioner or anyone else and remain in effect today. See 43 C.F.R. 418.1-418.5. The preamble to the regulations explains that the regulations "will initiate Departmental controls, lacking in the past, to limit diversions by TCID from the Truckee River within decreed rights, and thereby make additional water available for delivery to Pyramid Lake," in fulfillment of the United States' trust responsibility to the

Tribe. 43 C.F.R. 418.1(b). The preamble stresses, however, that the rules and regulations were "developed within the framework of agreements, decrees [*i.e.*, *Orr Ditch* and *Alpine*], understandings, and obligations of the United States or to which the United States is a party" (43 C.F.R. 418.1(g)), and the regulations elsewhere provide that the regulations "prescribe water uses within existing rights" and "do not, in any way, change, amend, modify, abandon, diminish, or extend existing rights" (43 C.F.R. 418.5).

The regulations provide for the establishment of a committee to develop operating criteria and procedures (OCAP) for each "water year" beginning on October 1 and ending on September 30. Such operating criteria are to govern the "coordinated operation and control of the Truckee and Carson Rivers in regard to the exercise of water rights of the United States" (43 C.F.R. 418.3(a)). The express purposes of the criteria and procedures are: (1) to comply with "all of the terms and provisions" of the *Orr Ditch* and *Alpine* decrees governing the use of Truckee and Carson River waters, and (2) to maximize the use of Carson River waters to satisfy the water requirements on the Newlands Project and thereby conserve Truckee River flows so as to make as much water available for Pyramid Lake as possible. 43 C.F.R. 418.3(a). The regulations also limit combined Truckee and Carson water diversions to 406,000 acre-feet per water year, "if available" (43 C.F.R. 418.4(b)), subject to possible reduction in years after 1966 as the operating criteria provide a body of water-management experience (43 C.F.R. 418.4(c)). Finally, the regulations, as promulgated in 1967 and still in effect, expressly provide that "[t]he District's [*i.e.*, petitioner's] operation of the irrigation works,

including the diversion of water, shall be in compliance with all of the terms and provisions of the [*Orr Ditch*] and the [*Alpine*] Decree[s], the rules and regulations in this part, and the operating criteria and procedures adopted by the Secretary." 43 C.F.R. 418.4(a).

Annual operating criteria and procedures thereafter were developed pursuant to the general regulations. The Secretary's 1972 operating criteria set a limit on diversions for the Newlands Project in the amount of 378,000 acre feet. 37 Fed. Reg. 19838 (1972).

3. a. In 1970, the Tribe brought an action in the United States District Court for the District of Columbia against the Secretary of the Interior. See *Pyramid Lake Paiute Tribe of Indians* v. *Morton*, 354 F. Supp. 252 (D.D.C. 1972 and 1973). In subsequent proceedings, the Tribe alleged that the operating criteria for 1972 violated the Secretary's general regulations codified at 43 C.F.R. Part 418 and that the diversion of 378,000 acre-feet of water permitted by those criteria was in excess of the amount needed for the Project and reduced needed flows for Pyramid Lake. The Secretary moved to dismiss the suit for failure to join indispensable parties (the Newlands Project water users) and, in the alternative, to transfer the case to the United States District Court for the District of Nevada. The district court denied both motions.

After trial, the district court declared that the Secretary's 1972 operating criteria were unlawful. The court recognized that neither it nor the Secretary could adopt or require a regulation that would infringe upon the *Orr Ditch* and *Alpine* decrees. But the court found from the evidence that the Secretary had formulated the operating criteria for 1972 by

"totally ignoring" the 2.92 acre feet per acre in the temporary *Alpine* decree that was then in effect (see page 3, *supra*) and instead had calculated water use on the basis of the greater maximum quantities in the *Orr Ditch* decrees. 354 F. Supp. at 257. In the court's view, the evidence also established that the criteria were "wholly inadequate" to prevent waste within the petitioner District; that water could be conserved for Pyramid Lake through better management without offending existing decrees or contractual rights; and that the Secretary has the right under the 1926 Contract "to require [petitioner] to conduct its affairs in a non-wasteful manner" (354 F. Supp. at 257; see Art. 7, Pet. App. A45-A46). The court further found in this regard that "[t]he operations of [petitioner] are not tightly controlled and water is taken practically on demand without necessary safeguards to prevent improper and wasteful use," and that the absence of enforcement mechanisms in the Secretary's criteria must be considered in light of petitioner's formal statement that it would disregard even the Secretary's own criteria that were challenged by the Tribe and instead "divert water as it chooses by giving instructions to its own water masters" (354 F. Supp. 257-258).

Based on these findings, the court ordered the Secretary to submit new operating criteria by January 1, 1973, for the court's review. The Tribe also submitted proposed operating criteria, upon which petitioner commented prior to the court's determination. Tribe Supp. E.R. 211-214. On February 20, 1973, the district court issued its judgment and order (354 F. Supp. at 261-262), which approved a revision of the operating criteria (*id.* at 262-266). The Secretary did not take an appeal from this judgment (Pet. App. A8), and the Secretary published the

court-approved operating criteria in the Federal Register in March 1973. 38 Fed. Reg. 6697.

b. In accordance with the Secretary's proposal, the new operating criteria approved by the court provided for a maximum diversion of water of 350,000 acre-feet for the Project in the 1973 water year. However, the court specified a maximum diversion of 288,129 acre-feet for the Project in the 1974 water year. 354 F. Supp. at 261, 262. The latter figure was calculated on the basis of the Project's overall needs, taking into account the 2.92 afa water duty under the temporary *Alpine* decree that was then in effect for the Carson River. Tribe Supp. E.R. 211-214. The criteria also forbade any further nonirrigation diversions for the remainder of the 1973 water year (354 F. Supp. at 265); provided for establishment of a central facility to coordinate Project water deliveries and for improved methods of flow measurement at farm turnouts to be operated only by petitioner's employees (*ibid.*); and restricted delivery of Project water only to those lands for which petitioner "has in advance established to the satisfaction of the Secretary * * * that a current valid water right exists" (*ibid.*).

4. Upon publication of the new criteria, the Secretary took immediate steps to implement them. The Bureau of Reclamation established a program to monitor petitioner's operation of the Project in light of the new criteria and procedures, attempted to determine the precise lands that possessed water rights under the Project, and initiated efforts to institute a water measurement program (Gov't E.R. 35, 36, 39, 40, 42).

In June 1973, petitioner informed the Bureau of Reclamation that it intended to divert additional

Truckee River water to the Lahontan Reservoir, acknowledging that it would be in "direct violation" of the 1973 criteria (Tribe Supp. E.R. 220), even though the Project had an ample supply of water for the remainder of the year (E.R. 347). The Secretary, on June 15 and July 31, 1973, informed petitioner that it risked termination of the 1926 Contract if the violations continued (E.R. 360-361). In the face of that warning, petitioner once again, on September 10, 1973, authorized diversion of water from the Truckee River to the Lahontan Reservoir (Tribe Supp. E.R. 240). On September 14, 1973, the Secretary notified petitioner that, pursuant to Article 32 of the 1926 Contract (Pet. App. A65), he was terminating the Contract as of October 31, 1974 (E.R. 375-377). The Secretary stated that the termination was necessary due to petitioner's repeated and "willful violation of the Department's Operating Criteria and Procedures" (E.R. 377), particularly petitioner's June and September Truckee River diversions. The Secretary also cited the fact that petitioner continued to deliver water to nonwater right lands and had failed to establish an adequate measurement program (*ibid.*).

5. a. On March 18, 1974, petitioner filed this action in the United States District Court for the District of Nevada seeking an injunction barring the Secretary from terminating the 1926 Contract and a declaration that the operating criteria and procedures were invalid. The district court granted the Tribe's motion to intervene as a defendant. The court then held four days of trial in October 1979, after which the case was held in abeyance pending this Court's decision in *Nevada* v. *United States, supra,* and the Ninth Circuit's decision in *United States* v. *Alpine Land & Reservoir Co., supra.*

On August 18, 1983, the district court entered its judgment denying all of petitioner's requested relief and declaring that the Secretary legally terminated the 1926 Contract (Pet. App. A32). The court found substantial evidence that petitioner knowingly failed to comply with the 1973 operating criteria and procedures (*id.* at A14), observing that certain violations were detailed in testimony presented by a member of petitioner's own board of directors (*id.* at A13-A14).

With respect to the validity of the criteria, the district court held that the Secretary did not violate the Administrative Procedure Act by promulgating the 1973 operating criteria without following the notice and comment rulemaking provisions in 5 U.S.C. 553, because the operating criteria constituted "rules regarding public contracts" within the meaning of the exemption from such procedures in 5 U.S.C. 553(a)(2) (Pet. App. A20-A21). The court also held that the rules were within the Secretary's statutory authority that was expressly reserved in the 1926 Contract (Pet. App. A22-A24) and that the operating criteria were not arbitrary and capricious because their prior approval by the United States District Court for the District of Columbia indicated that the Secretary had considered the relevant factors and made no error of judgment and because petitioner had failed to present any evidence to the contrary (*id.* at A24). Finally, the court found the operating criteria to be enforceable by means of the termination provision in Article 32 of the 1926 Contract (*id.* at A25-A29).

The district court acknowledged that the operating criteria had been approved by the United States District Court for the District of Columbia in a suit to which petitioner and the Project water users were not parties (Pet. App. A31-A32). But the court continued (*id.* at A32):

> Whatever one may think of such a situation, it is nonetheless clear that self-help to the extent to which [petitioner] availed itself is not the remedy. It could not defy the regulations and after notification of contract termination defend upon the ground that if it had presented its case by intervention in the District of Columbia court or if it had prior to termination attacked the new regulations in a Nevada court, grounds for termination of the contract would not have existed.

b. The court of appeals affirmed (Pet. App. A1-A10). The court first held that the proceedings in the suit in the United States District Court for the District of Columbia did not deprive petitioner of any property right without due process of law. The court held in this regard that petitioner, as an irrigation district, has no water rights of its own that were affected by the District of Columbia suit and the operating criteria (Pet. App. A5-A7). The court of appeals acknowledged that the 1926 Contract did grant petitioner the right to manage the Project, but the court concluded that the District of Columbia suit did not impermissibly interfere with that right, because the 1926 Contract reserved to the Secretary the right to issue the operating criteria (*id.* at A7-A8) and those criteria were not arbitrary or capricious (*id.* at A9). Nor, the court held, did the Secretary act unlawfully in terminating the Contract, because petitioner "readily admit[ted]" that it violated the operating criteria by diverting more water in 1973 than was permitted by the criteria and because the Contract "explicitly gave the Secretary the right to terminate the contract if [petitioner] violated regulations concerning the operation of the Newlands Project" (*id.* at A9-A10).

6. After the district court rendered its decision and denied petitioner's application for a stay of the termination of the 1926 Contract pending appeal, petitioner and the United States, on February 14, 1984, entered into a Temporary Operation and Maintenance Agreement permitting petitioner to continue to operate the Project. That contract remains in effect, although it may be terminated by either party on 45 days' notice.

ARGUMENT

The decision of the court of appeals is correct and, contrary to petitioner's contention, is fully consistent with this Court's decision in *Nevada* v. *United States*, 463 U.S. 110 (1983). The district court found, and petitioner does not dispute, that petitioner knowingly defied the 1973 operating criteria in a number of respects. The 1926 Contract explicitly permitted the Secretary to terminate petitioner's management rights in such circumstances. The Secretary's decision to do so raises no questions of general importance warranting review by this Court. Even as regards the Newlands Project, petitioner's objections to the operating criteria promulgated in 1973 and to the role of the United States District Court for the District of Columbia in bringing them about are of no continuing importance, because since the certiorari petition was filed, the Secretary has proposed revised operating criteria and the original suit challenging the operating criteria has been transferred to the District of Nevada. Especially with circumstances in this fluid state and in a posture to be considered by the same district court that is responsible for administration of the *Orr Ditch* and *Alpine* decrees, there is no occasion for this Court to intervene.

1. As an initial matter, petitioner plainly errs in contending (Pet. 13-16) that the decision below is inconsistent with this Court's decision in *Nevada* v. *United States*, 463 U.S. 110 (1983), and "unsettles" vested Truckee River water rights under the *Orr Ditch* decree that were confirmed in that case.

The present case has nothing to do with anyone's right under the *Orr Ditch* or *Alpine* decree to receive a particular amount of Truckee or Carson River waters. To the contrary, as explained above (see pages 4-5, *supra*), the basic regulations promulgated in 1967, pursuant to which the annual operating criteria are issued, expressly provide that they are intended to *satisfy* decreed water rights and that those rights are unaffected by the regulations. Moreover, the judgment of the United States District Court for the District of Columbia that approved the operating criteria petitioner challenges likewise states that it does not affect the rights of any person under the *Orr Ditch* and *Alpine* decrees (354 F. Supp. at 262), and the diversion limitations in the operating criteria were calculated to satisfy the water rights as they were then in effect under the final *Orr Ditch* decree and the temporary decree in *Alpine*. See page 8, *supra*. The only issue in this case is *who*—the United States or petitioner—will operate the Newlands Project and thereby provide Project water users with the judicially decreed amounts of water to which they are entitled. The court below simply found that the Secretary of the Interior acted within the scope of his authority by: (1) promulgating regulations governing the operation of the Project, within the limits of the *Orr Ditch* and *Alpine* decrees and other restraints, in a manner that minimizes waste and maximizes the amount of Truckee River water left over to be fur-

nished to Pyramid Lake; and (ii) terminating the 1926 Contract after petitioner repeatedly refused to abide by those regulations. The court of appeals' decision therefore respects, not "unsettles," water rights confirmed in *Nevada* v. *United States*, *supra*.

There is no indication that Project water users would have received less water for their farms than that to which they were entitled under the *Orr Ditch* and *Alpine* decrees if petitioner had fully complied with the 1973 criteria that it concededly violated. So long as that obligation is met, nothing in the *Orr Ditch* and *Alpine* decrees—or in this Court's decision in *Nevada* v. *United States*—prohibits the Secretary from issuing regulations for the coordinated, economical, and nonwasteful operation of government-owned Project works on the Truckee and Carson Rivers.[2] By doing so, the United States can maximize the amount of water remaining in the Truckee River after diversions at Derby Dam necessary to satisfy Project water rights, and thereby maximize the amount of water that flows into Pyramid Lake for the benefit of the Tribe and its fishery. See *Nevada* v. *United States*, 463 U.S. at 146 n.* (Brennan, J., concurring). This Court recognized in *Nevada* v. *United States* that the United States has a continuing fiduciary obligation to the Tribe as regards the Lake and water needed for it, just as the United States

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[2] Indeed, the *Orr Ditch* decree itself specifically provides that the water rights were decreed to the United States for irrigation on the Newlands Project and for other purposes, "under such control, disposal and *regulation* as the [United States] may make or desire" (E.R. 38 (emphasis added)). Although the United States has sold the right to use water from the Project to individual farmers, that action does not affect the right of the United States to regulate the operation of the Project itself.

has an obligation to satisfy the decreed water rights of Project water users (463 U.S. at 127). Moreover, the Endangered Species Act, 16 U.S.C. 1531 *et seq.*, now also empowers the Secretary to protect the fish in Pyramid Lake within the limits of existing authorities. See *Carson-Truckee Water Conservancy Dist.* v. *Clark*, 741 F.2d 257 (9th Cir. 1984), cert. denied, No. 84-808 (Mar. 25, 1985).[3]

2. a. Quite aside from the matter of vested water rights, petitioner challenges the validity of the operating criteria (see Pet. 22-27) and the role of the United States District Court for the District of Columbia in bringing them about (see Pet. 18-22). However, these issues are of no continuing importance in light of events that have transpired since the certiorari petition was filed.

First, on March 29, 1985, the United States District Court for the District of Columbia granted the

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[3] Contrary to petitioner's contention (Pet. 14-15), this Court's holding in *Nevada* v. *United States*—that the doctrine of res judicata bars the United States and the Tribe from obtaining a judicial declaration of a right to water for fishery purposes as against the previously decreed water rights of Project water users—does not prevent the Secretary from taking steps to prevent wasteful practices and to make available for Pyramid Lake any water that is *not* needed to satisfy the vested rights of Project water users under the *Orr Ditch* decree. Neither *Orr Ditch* nor *Nevada* v. *United States* gave Project water users, much less petitioner, a right to continue to receive water in excess of the amount decreed. And neither *Orr Ditch* nor *Nevada* v. *United States* bars the Tribe from receiving more water than that actually decreed to it for irrigation purposes in *Orr Ditch*, so long as other decreed rights are not adversely affected. If the rule were otherwise, not a drop of water would be permitted to reach Pyramid Lake, the terminus of the Truckee River. This Court plainly did not intend that drastic consequence.

Secretary's motion to transfer the *Pyramid Lake Paiute Tribe* v. *Morton* suit to the District of Nevada. As a result, either petitioner or individual Project water users now have the opportunity to intervene and participate in a convenient forum in any further proceedings that may ensue in that case. Significantly, moreover, the United States District Court for the District of Nevada also has jurisdiction to administer and construe the *Orr Ditch* and *Alpine* decrees, so the potential for conflicting judicial interpretations and orders concerning those decrees and other matters, about which petitioner has complained in the past, should no longer arise.

Second, on February 12, 1985, the Secretary published, in proposed form, detailed new operating criteria to govern the Newlands Project and the Truckee and Carson River Basins for 1985. 50 Fed. Reg. 5934-5947.[4] The new proposal, like the prior criteria and regulations, stresses that the criteria must "provid[e] the legal water entitlement to each water right holder on the Newlands Project" under the *Orr Ditch* and *Alpine* decrees, but that "[s]ome discretion * * * is allowed in translating water duties into a total annual diversion for the project and developing operating criteria." 50 Fed. Reg. 5934 (1985). Against this background, the stated purposes of the new criteria are: "[t]o achieve efficient water management techniques; to implement equitable operating procedures for the Project * * *; and to ensure that irrigation and other water uses receive the water to which these uses are entitled under ap-

[4] On March 22, 1985, the Interior Department also proposed a corresponding revision of the basic regulations in 43 C.F.R. Part 418, pursuant to which the annual operating criteria are issued. 50 Fed. Reg. 11515 (1985).

plicable court decrees, and that water in excess of such entitlements is not diverted at Derby Dam or released from Lahontan Dam." *Ibid.* Public hearings have been held on the proposed criteria; the comment period has now closed; and those criteria can be expected to be published in final form in the near future. In addition, on March 19, 1985, the Secretary established interim operating criteria to govern the Project until the final criteria are approved.

As a result of these developments, the 1973 operating criteria that petitioner challenges in this suit will have no prospective application, and any dispute regarding their application to Project water users is therefore now essentially moot. Nor does petitioner's contention that the 1973 criteria were unlawful because of the role of the United States District Court for the District of Columbia have any application to these new criteria, because the Department of the Interior took the initiative in formulating them and they unquestionably reflect the exercise of that Department's own judgment and discretion. Moreover, if petitioner or Project water users have any remaining objections to the new criteria after they are published in final form, they may challenge those criteria in the United States District Court for the District of Nevada, since the *Pyramid Lake Paiute Tribe* v. *Morton* suit has been transferred there.[5] In the meantime, pursuant to the interim contract entered into in February 1984 (see page 12, *supra*), petitioner continues to operate the Newlands Project, as it has done since the termination notice was sent in 1973.

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[5] Judicial approval of the new criteria may be required under the judgment in *Pyramid Lake Paiute Tribe* v. *Morton*. If the district court declines to approve them, any party aggrieved presumably would be entitled to take an appeal.

There accordingly is no need for this Court to intervene in the ongoing and complex process of harmonizing the various rights and interests in the Truckee and Carson River Basins.

b. In any event, petitioner's contention (Pet. 22-27) that the Secretary has no authority to issue regulations and criteria for the coordinated and efficient operation of the Newlands Project is completely without merit. Section 10 of the Reclamation Act of 1902, pursuant to which the Newlands Project was constructed, expressly authorizes the Secretary "to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purposes of carrying out the provisions of this Act into full force and effect." 43 U.S.C. 373. Section 8 of the same Act provides that "[t]he right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. 372. These provisions plainly authorize the Secretary to issue regulations to prevent waste, which is not a "beneficial use" permitted by Section 8, and to "limit" the amount of water diverted and released for irrigation to only the amount necessary to satisfy Project water rights.

Moreover, Article 7 of the 1926 Contract between petitioner and the United States required petitioner to operate the Project in accordance with "the rules and regulations of the Secretary [then] in force or [t]hereafter promulgated" and to "use all proper methods and precautions to secure the economical and beneficial use of irrigation water" (Pet. App. A45-A46). Similarly, in Article 34 of the Contract, the Secretary reserved the right "to make reasonable rules and regulations * * * as may be deemed proper

and necessary to carry out the true intent and meaning of the law and of this contract," and petitioner in turn agreed "that in the operation of the transferred works, all such rules and regulations will be fully adhered to" (Pet. App. A66). Thus, the 1926 Contract reserved to the Secretary the authority to promulgate regulations not only to implement the reclamation laws, but also to carry out the intent of the Contract itself. The latter authority necessarily includes the authority to issue regulations to carry out petitioner's contractual obligation under Article 7 to "use all proper methods and precautions to secure the economical and beneficial use of irrigation water." Finally, under Article 12 of the 1926 Contract, any land owner who accepts Project water is deemed to have consented to the provisions of the Contract and to have waived any and all objection thereto (Pet. App. A52-A53). By virtue of the foregoing Contract provisions, both petitioner and individual Project water users have agreed to the Secretary's issuance of the very sort of regulations and operating criteria that petitioner has challenged in this suit.

The Secretary's actions also are consistent with the background of legislation passed by Congress contemporaneous to the 1926 Contract. As recited in Article 1 (Pet. App. A42), the 1926 Contract was entered into pursuant to, inter alia, the Omnibus Adjustment Act of 1926, ch. 383, 44 Stat. 636 *et seq.* Section 23 of that Act (44 Stat. 641) excused water users on the Newlands Project from payment of certain costs of the Project, and Section 45 (44 Stat. 648) provided for the extension of the period for repayment by water users of construction costs of a reclamation project if an irrigation district assumed liability for those charges. The Omnibus Adjustment

Act of 1926 in response to the Fact Finders Report, which detailed the various difficulties then confronting the reclamation program. One such problem addressed by the Fact Finders was the wasteful use of water on reclamation projects. S. Doc. No. 92, 68th Cong., 1st Sess. 76-79 (1924). The Fact Finders recommended that, "if necessary, compulsory steps should be taken to prevent the excessive use of water in irrigation, as a means of making the water user protect himself against his own wasteful practices." *Id.* at 78. The provision in the 1926 Contract requiring petitioner to ensure the economical and beneficial use of irrigation water accords with that recommendation.

c. Petitioner's challenge to the operating criteria on the basis of the role of the United States District Court for the District of Columbia in formulating them (Pet. 18-22) also is without merit. Petitioner's objection is that the criteria were formulated by that court in 1973 "over the objection of the Executive" (Pet. 18) and that they therefore do not reflect an exercise of discretion by the Secretary. However, whatever the merits of that objection might have been had it been pursued (either by the Secretary or petitioner) in the *Pyramid Lake Paiute Tribe* v. *Morton* suit itself in 1973, that issue is not appropriate for review at the behest of the petitioner in these separate proceedings many years later.

The judgment in *Pyramid Lake Paiute Tribe* v. *Morton* was not appealed by the government. The Interior Department accordingly published the criteria approved in that suit in March 1973, and the Department thereafter made clear that it would enforce them against petitioner. See pages 8-9, *supra*. By this action, the criteria became, in contemplation of law, the Secretary's criteria. Accordingly, under the

provisions of the 1926 Contract discussed above, petitioner was obligated to follow them.[6] If petitioner did not believe that the criteria were substantively valid, it presumably could have challenged them promptly in an appropriate district court and perhaps sought a preliminary injunction barring their enforcement pending a final resolution. But neither petitioner nor Project water users followed that course. Petitioner instead resorted to self-help through outright defiance of the criteria, despite its express agreement in the 1926 Contract that such regulations would be "adhered to" in the operation of the Project and despite repeated warnings by the Department of the Interior that such defiance could lead

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[6] Petitioner notes (Pet. 7, 20) that the Department of the Interior favored appeal in *Pyramid Lake Paiute Tribe* v. *Morton* (Pet. App. A106-A107), but that the Department of Justice decided not to appeal (Pet. App. A108). That background has no relevance here. By statute, Congress has directed the Attorney General and the Solicitor General to control litigation such as this (28 U.S.C. 516, 519), and the Department of Justice exercised that authority with full knowledge that the consequence would be that the court-approved operating criteria would be implemented. Thus, for whatever reason, the responsible officials were prepared to accept, on behalf of the Executive Branch, the criteria petitioner challenges. Any difference of views within the Executive Branch that preceded that determination has no bearing on *petitioner's* obligation to adhere to the criteria that concededly were promulgated by the Secretary after the decision was made not to appeal. Petitioner's challenge to the operating criteria on the ground discussed in this footnote therefore is, in substance, a collateral attack on the Attorney General's determination not to take an appeal in *Pyramid Lake Paiute Tribe* v. *Morton* in 1973. That determination, however, was committed to the discretion of the Executive. See, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976); *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868).

to termination of the Contract. Petitioner cannot now avoid the termination of the 1926 Contract that it virually invited by attempting to impeach the Secretary's issuance of operating criteria that otherwise are substantively valid, as both courts below held.[7]

3. Finally, petitioner contends (Pet. 27-28) that the Secretary's actions interfere with its rights under the Truckee River Agreement. The court of appeals correctly disposed of this issue, and it presents no question of general importance warranting review by this Court. As the court of appeals observed, the Truckee River Agreement, as incorporated in the *Orr Ditch* decree, gave petitioner "the right to dispose of a portion of the diverted flow of the Truckee River that reached Derby Dam. It did not give [petitioner] any property rights in the flow" (Pet. App. A7). There is nothing to prevent the Secretary, after satisfying decreed water rights held by Project farmers, from prohibiting use of the federally owned facilities for the transportation of water not needed to satisfy those decreed water rights.

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[7] Petitioner's contention (Pet. 16-18) that it has standing to represent the interests of Project water users is beside the point for the same reason. The authority of petitioner, in a *representative* capacity, to vindicate the interests of Project water users in a lawsuit under some circumstances (which we may assume for present purposes) does not give it the authority in its *managerial* capacity under the 1926 Contract to defy rules and regulations promulgated by the Secretary. For this reason, petitioner cannot avoid termination of the 1926 Contract by reference to the water rights of Project water users. Moreover, the rights of Project water users were exactly the same after termination as they were before, so the termination of petitioner's right to manage the Project raises no due process issue regarding the interests of Project water users that would, in turn, be presented by petitioner in this suit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

PETER R. STEENLAND, JR.
DIRK D. SNEL
ALBERT M. FERLO, JR.
Attorneys

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner,

vs.

SECRETARY, DEPARTMENT OF THE INTERIOR,
Respondent.

vs.

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Respondent-Intervenor.

REPLY BRIEF

KRONICK, MOSKOVITZ,
TIEDEMANN & GIRARD
A Professional Corporation
*FREDERICK G. GIRARD
JANET K. GOLDSMITH
ROBIN L. STEWART
ANDREA M. MILLER
COUNSEL OF RECORD*
770 L Street, Suite 1200
Sacramento, CA 95814
Telephone (916) 444-8920
Attorneys for Truckee-Carson Irrigation District

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH STREET • S.F., CA 94103 • (415) 864-2300

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REPLY BRIEF

1. The Tribe's Contention That The Decisions Below Are Consistent With *Nevada v. United States* Cannot Be Sustained.

In the Petition, TCID demonstrated the conflict between this Court's decision in *Nevada v. United States,* 463 U.S. 110 (1983), and the decisions below. It is indeed telling that the only counter-argument the Tribe can muster relies on misrepresentation of the origin, the purpose, and the impact of the operating criteria the enforcement of which was upheld therein.

The Tribe belatedly attempts to deny that the operating criteria drastically reduced the farmers' *Orr Ditch* rights.[1] It now asserts that the criteria were "intended only to reduce the *volume of*

[1] The pertinent portions of the *Orr Ditch* decree, entered in *United States v. Orr Water Ditch Co., et al.,* Equity No. A-3 (D.Nev. 1944), of which this Court can take judicial notice, see F.R.E. Sec. 201, are reproduced in the Appendix to Truckee-Carson Irrigation District's

water diverted," but "in no way were designed to diminish the farmers' *water duty.*" (Emphasis added.) Tr. Br. at 12. The Tribe's suggestion that the criteria were premised on reducing conveyance or storage losses on the Project rather than on reduction in the farmers' water duty entitlements is flatly untrue, as even the Tribe admits elsewhere in its brief. Tr. Br. at 14-15. We agree with the Tribe's later admission that "[i]t is abundantly clear that *the criteria were premised on water duty.*" (Emphasis added.) *Id.* And, as the Ninth Circuit found in the *Alpine* case, "a reduction to the 3 afa water duty sought after by the United States would drastically reduce the farmers' yields over the long term." *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 857 (9th Cir. 1983).

Respondent United States freely acknowledges the conflict between the diversion limits imposed by the criteria and the water duty guaranteed the farmers by the *Orr Ditch* final decree and affirmed in *Nevada v. United States, supra.* Its pending legal challenge to the *Orr Ditch* watermaster's diversion of water from the Truckee River to satisfy the Newlands farmers' rights is based on its contention that such diversion "directly conflicts with the order of the District of Columbia District Court [*Tribe v. Morton*] enjoining storage in Lahonton Reservoir." App. A-158. And the United States is currently revising the operating criteria to remedy the very conflict with the farmers' decreed rights which precipitated this litigation and which the Tribe now denies. *See* Tr. Br. at 13 n.12.[2]

Similarly incomprehensible is the Tribe's assertion that

Petition for Certiorari in *Nevada v. United States,* No. 81-2276 in this Court.

[2] The United States' statements that interim criteria have been adopted and promulgation of revised criteria is imminent are incorrect, as well as unsupported by citation. The interim criteria proposed by the Secretary were rejected by the *Tribe v. Morton* court on September 27, 1984 and TCID is unaware of any new operative criteria in effect at this time. And TCID has been informed by Interior that environmental studies of the impacts of proposed new criteria will delay substantially their promulgation as well as any decision on diversion criteria to be established therein.

> the fact that reduced diversions would result in more Truckee River water flowing into Pyramid Lake does not mean that the Tribe is receiving ten times the amount [of water] awarded the Tribe in Orr Ditch. TCID Petition at 14. Rather, as the terminus of the Truckee River, Pyramid Lake is the *indirect beneficiary of the Secretary's decision to hold the farmers to no more than their Orr Ditch rights.* (Emphasis added.)

Tr. Br. at 12-13.

Had the Secretary made any such decision as the Tribe claims, this case would never have been brought, since

> the [3.5 afa and 4.5 afa] water duty awarded by the District Court [in the Alpine final decree] has been customarily provided the farmers since before 1926 when TCID began operation of the Newlands Project. *This has also been the water guaranteed the Newlands Project farmers under the Orr Ditch Decree.* (Emphasis added.)

United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 857 (9th Cir. 1983). Clearly, had the Secretary's "decision" been based on the farmers' *Orr Ditch* rights as the Tribe asserts, no reduction in diversions would have been warranted.

Instead, the very basis for the diversion limitation of the operating criteria was the *Tribe v. Morton* court's unequivocal directive to the Secretary of the Interior to "assure the delivery of at least 385,000 acre-feet of water to Pyramid Lake." *Pyramid Lake Tribe v. Morton*, 354 F.Supp. 252, 260 (D.D.C. 1973). Not until the Secretary's responsive limit proposal had been rejected by the *Tribe v. Morton* court and replaced by the draconian figure of 288,129 afa did the Secretary suggest the 1973 limit of 350,000 afa to cushion the blow. That limit cannot be characterized as representing his deliberate and independent judgment as to the amount of water to which the farmers were entitled.

Rather than being the "indirect beneficiary" of the criteria, the Tribe was designedly the instigator and *only* beneficiary of the

diversion limit.[3] Since the fundamental purpose of the criteria was to *assure* that the Tribe would be receiving more than ten times the amount of water awarded it in *Orr Ditch*, *id.*, the Tribe's contention that the decisions below enforcing the criteria are "wholly consistent with *Nevada v. United States*," Tr. Br. at 12, cannot be sustained.

2. Respondents' Denial Of Due Process Violation Is Factually And Legally Untenable.

The United States naively asserts that since the *Tribe v. Morton* decision and the operating criteria expressly state that they do not affect the farmers' *Orr Ditch* rights affirmed by this Court in *Nevada v. United States*, those rights are *ipso facto* unaffected and no constitutional issue is therefore raised. U.S. Br. at 6; *see also* Tr. Br. at 14-15; App. A-6.

There is no question that both the *Tribe v. Morton* decree and the regulations promulgated by the court expressly state that they do not affect decreed rights. Nevertheless actions speak louder than words; a due process violation is not negated by hollow denials. It is undisputed that the criteria's diversion limit was premised on a substantially lower water duty than the *Orr Ditch* decree guaranteed. Tr. Br. at 6; 8 n.9; 13 n.12. And when the farmers, acting through TCID, diverted sufficient water to satisfy those decreed rights, TCID's operation contract was terminated and operation of the project was returned to the Secretary who is "under orders from the [*Tribe v. Morton*] court . . . actively to enforce" the diversion limit. App. A-159.

The ordered reduction of the water rights occurred without any adjudication by a court with jurisdiction over either the holders of those rights—the Newlands farmers—or the res—Truckee River water. Yet the *Tribe v. Morton* court predicated both its analysis

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[3] TCID challenged *all* of the criteria which the District Court held that it had violated. However, only the diversion limit is relevant to this Petition inasmuch as the Ninth Circuit based its entire decision on the fact that the limit was exceeded, and refused to consider whether termination of TCID's operating contract would have been justified on the basis of violation of any of the other challenged criteria. App. A-5; *see* U.S. Br. at 8; Tr. Br. at 17 n.15.

of the validity of the secretary's regulations and its own subsequently approved criteria on a determination that waste of water was, in fact, occurring. This factual determination of waste goes to the very heart of the Project farmers' entitlement to water, and in reality is a determination that they have no right to the amounts claimed (and in this case, decreed). *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 854 (9th Cir. 1983). The Constitution guarantees that rights cannot be thus adjudicated away in the absence of the rightholder. [4]

Nor can such rights be "regulated" away. TCID does not question that the Secretary had multifaceted duties arising from various statutes and that he has a trust obligation to the Indians. Those duties are, however, entirely divorced from his authority under the Reclamation Act. As this Court just held, the United States does not own the Project water rights and is not free to shift them about "like so many bushels of wheat," *Nevada v. United States*, 463 U. S. 110, __; 103 S.Ct. 2906, 2916 (1983), in order to fulfill his non-Reclamation duties and obligations.

If the Secretary felt that TCID's diversions and operations were wasteful, he could have and should have commenced proceedings against TCID to adjudicate that issue. In limiting the historical diversions there is no question that he was acting solely to further non-Reclamation goals, and not pursuant to Section 10 of the Reclamation Act.[5] TCID does not dispute the Secretary's duty to "take steps to prevent wasteful practices and to make

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[4] Even the Tribe appears to concede this elementary point of law, as evidenced by its strained argument that TCID should be bound by *Tribe v. Morton* due to its "privity" with the United States, Tr. Br. at 23 n.18, notwithstanding the United States' repudiation of such representational capacity. *See* U.S. Br. at 5.

[5] Respondents' assertion that the Endangered Species Act gives the Secretary additional regulatory authority to limit Newlands Project diversions, Tr. Br. at 18 n. 16; U.S. Br. at 13, demonstrates that, despite this Court's repeated holdings, respondents still do not understand that the water rights are vested rights belonging to the farmers, not rights with which the United States may deal as it sees fit. *See Nevada v. United States*, 463 U.S. 110, ___; 103 S.Ct. 2906, 2914-2916 (1983).

available for Pyramid Lake any water that is *not* needed to satisfy the vested rights of the Project water users under the *Orr Ditch* decree." U.S. Br. at 13 n.3. TCID's sole contention is that any such "steps" must conform to the procedural due process requirements of the Constitution. Respondents' persistent denial of this fundamental principle warrants this Court's attention.

Respondents' contention that Secretarial power and duties devolving from unrelated statutory delegations authorize the non-adjudicatory limitation of Reclamation Project water rights could, if carried to the extreme, result in their total elimination with the only remedy being an "*Overton Park*" type review[6] Such a notion, apparently acceptable to the courts below, has obvious and important implications to thousands of farmers throughout the West, as we pointed out in our opening brief. Pet. at 26. It deserves this Court's consideration and rejection.

The Tribe's brief in opposition to the Petition acknowledges the significant constitutional issues raised by this case. It squarely asserts that in order to protect vested property rights the holder thereof must intervene in any litigation in which those rights may be implicated, no matter how distant or inconvenient the forum. *See* Tr. Br. at 19-27. In order to support this constitutionally repugnant assertion, the Tribe engages in a novel interpretive exercise that completely distorts the authority relied upon. First, the Tribe argues that the enforcement of the *Tribe v. Morton* court's judgment against TCID and its constituent farmers was a constitutionally permissible action. However, in *Washington v. Washington State, Etc.*, 443 U.S. 658, 693 n.32 (1979), this Court stated that the issuance of court orders affecting the interests of non-parties is sanctioned only in specific situations: (1) when the action is necessary to protect established *public* rights; (2) when the orders are issued in the context of an *in rem* or analogous proceeding; or (3) when the affected persons were

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[6] The courts below held that TCID was not entitled to *de novo* adjudication of the issue of waste but could obtain relief from the water right reduction only if it met the much higher standard for relief from administrative rulemaking action articulated in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). *See, e.g.*, App. A-24; A-9.

adequately represented by a party to the underlying action. None of these circumstances is available to support the decisions below.[7]

Second, the Tribe attempts to characterize the instant action as an impermissible collateral attack on the *Tribe v. Morton* court's judgment,[8] based on on its contention that the District should have intervened in that action and, having failed to do so, is now foreclosed. Tr. Br. at 26. This Court has never endorsed such a position. In fact, it clearly held to the contrary in *Chase Nat. Bank v. City of Norwalk, Ohio,* 291 U.S. 431, 441 (1934):

> The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger . . . Unless duly summoned to appear in a legal proceeding, a person not privy may rest assured that a judgment therein will not affect his legal rights.

The District Court's determination that TCID's actions were impermissible "self-help," *see* App. A-32, and the Ninth Circuit's

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[7]The cases cited by the Tribe, *United States v. Hall*, 472 F.2d 261, 265 (5th Cir. 1972) (order in desegregation case may affect non-parties where necessary to protect court's decision); *Golden State Bottling Company, Inc. v. N.L.R.B.*, 414 U.S. 168, 180-181 (1973) (due process inquiry unnecessary where petitioner had a meaningful opportunity to be heard); and *United States v. United Mine Workers of America*, 330 U.S. 258, 292-293, 293-294 (1947) (petitioner had been an active party in the subject action), illustrate the situations enumerated in *Washington State, supra*, but have no application to the circumstances presented by this action.

[8] The authorization relied upon to illustrate the impact of this characterization are inapplicable to the present case. In *GTE Sylvania, Inc. v. Consumers Union, Etc.*, 445 U.S. 375, 386 (1980), the Court found that a restraining order issued by one district court destroyed the plaintiff's cause of action under the Freedom of Information Act in a second court. No constitutionally protected rights were at stake. In *O'Burn v. Sharp*, 70 F.R.D. 549, 552 (E.D. Pa. 1976), a collateral attack was held impermissible where the purportedly offending consent decree at issue was subject to modification or dissolution by the very court in which the collateral attack was mounted, thereby demonstrating that the original forum was at least convenient.

affirmation of that decision completely abrogates the fundamental constitutional premise underlying the holding in *Chase*. Because the decisions below constitute a significant erosion of Constitutional protection, this Court should review and reverse those decisions.

3. Contrary To The United States' Assertions, Nothing Has Occurred Which Would Lessen The Factual Or Legal Impact Of The Decisions Below.

Finally, the United States has argued that the issues in this case are of no continuing importance because (1) the *Tribe v. Morton* case has now been transferred to a convenient forum and "as a result, either petitioner or individual Project water users *now* [post judgment] have the opportunity to intervene and participate," (2) the Secretary has proposed *new* operating criteria, and (3) the Secretary has allowed TCID to continue operating the Project under a temporary operating contract. U.S. Br. at 14. Rather than demonstrating the unimportance of this case, however, these developments simply underscore the significant constitutional issues involved: (1) Both the Newlands farmers and the *res* of the dispute were absent from the distant and inconvenient forum which determined the operating criteria's factual predicate of "waste" and ordered the reduction of the farmers' water rights based thereon; (2) The criteria published in 1973 pursuant to court order provided an insufficient diversion allowance to satisfy the farmers' decreed entitlements and must now be amended to allow satisfaction of those rights; and (3) The federal court must still initially *approve* any new regulations *before* they can be promulgated, not just review them upon challenge.[9] Thus, even if the farmers eventually obtain criteria which allow their decreed

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[9] Moreover, the United States has not rescinded its termination of the 1926 operating contract. The temporary operating contract between TCID and the United States was entered into solely to preserve the parties' position pending the outcome of this litigation and is terminable at will upon forty-five days' notice. Ironically, its express terms forbid the parties to refer to or rely upon it in this litigation, in order to preclude the inference of mootness the United States has drawn. *See* Supp. App. at SA-3.

rights to be satisfied,[10] the precedential impact of the process approved by the courts below poses a continuing threat to due process guarantees and must be reversed.

4. Conclusion

This Court has never held that one may lose one's vested rights by failing to discover and intervene in a distant action in which those rights may be implicated. This Court has never held that federal courts may formulate and dictate executive decisions, nor that informal rulemaking can operate to divest private rights without procedural due process. Denial of this Petition would leave standing lower court decisions which could be cited as precedent for those propositions. Because of the enormous implications of such doctrines, this Court should review and reverse the decisions below.

Respectfully submitted,

KRONICK, MOSKOVITZ,
TIEDEMANN & GIRARD
A Professional Corporation

* FREDERICK G. GIRARD
JANET K. GOLDSMITH
ROBIN L. STEWART
ANDREA M. MILLER
Attorneys for Truckee-Carson Irrigation District

(Supplemental Appendix follows)

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[10] The Respondents' reliance on the extra-legal principle of "no harm, no foul," Tr. Br. at 13 n.12; U.S. Br. at 14-15, is not convincing in any event. There is no guarantee that any new criteria will provide the Newlands farmers sufficient water, or that the Tribe will not challenge them (leaving only the present inadequate diversion levels). If TCID *does* intervene, will it then be bound by the earlier determination of waste? If it does not intervene, will it be any more successful in persuading a court in a different lawsuit to review the merits of the criteria than it was in this lawsuit? *See* App. A-33.

SUPPLEMENTAL APPENDIX

TEMPORARY OPERATION AND MAINTENANCE AGREEMENT BETWEEN TRUCKEE-CARSON IRRIGATION DISTRICT AND THE UNITED STATES OF AMERICA

Contract No.
4-07-20-X0268

WHEREAS, the Court in *Truckee-Carson District v. Secretary of the Department of the Interior v. Pyramid Lake Paiute Tribe of Indians*, Civ. No. R-74-34 BRT (D.Nev.) entered its order on August 17, 1983 upholding the Secretary's right to terminate the December 18, 1926 agreement between the United States of America, hereinafter referred to as the United States, and the Truckee-Carson Irrigation District, hereinafter referred to as District; and

WHEREAS, the District Court denied District's motion to stay execution of its order, and

WHEREAS, District has appealed the order to the Ninth Circuit Court of Appeals and is presently seeking a stay of execution of the District Court's decision; and

WHEREAS, the 1926 agreement provides for District's operation and maintenance of the Newlands Project; and

WHEREAS, District has continued and desires to continue operation and maintenance of the project; and

WHEREAS, United States is willing to allow District to continue operation and maintenance of the project on certain conditions:

It is therefore agreed that:

1. For the term of this agreement the United States agrees that the District shall continue to have the care, operation and maintenance of all lands and works used for operative purposes, including Lahontan Reservoir lands and Dam; Lake Tahoe lands, Reservoir and Dam, excluding the 64-Acre Tract as described in

the *United States v. Truckee-Carson Irrigation Dist.* No. S-78-611 MLS (E.D. Cal.); the Derby Diversion Dam, lands and Reservoir; Lahonton Power Plant (subject to existing leases); Carson Lake pasture, and all other lands, dams, diversion works, buildings, canals, laterals, sublaterals, ditches, distribution and drainage systems, stock water pipelines, power distribution lines, telephones and telephone lines, the Fallon office records, files, engineering maps and data, (which records, files, engineering maps and data shall be available at all times for use by the United States) and any other works now operated, owned or used by the United States in connection with the irrigation and development of lands of the Newlands project. No title to any of the works in this paragraph mentioned passes to the District.

2. The District hereby agrees to continue to be responsible for the care, operation and maintenance of the above-referenced works, and will care for, operate and maintain the same and deliver water therefrom in full compliance with the National Reclamation Law, as said laws now exist or as they may hereafter be amended or supplemented; court orders and decrees; contracts heretofore entered into between the United States and various persons for the delivery of water; the terms and conditions of this agreement; the applicable rules and regulations of the Secretary now in force or hereafter promulgated; and, in such manner that said transferred works shall remain in as good and efficient condition and of equal capacity for the development, diversion and distribution of irrigation water and for the development of power as is now the case, reasonable wear and damage by the elements excepted, and will use all proper methods and precautions to secure the economical and beneficial use of irrigation water, the said operation and maintenance and control of said transferred works to be without expense to the United States, except as to its lands benefiting therefrom.

3. The Secretary shall cause to be made from time to time a reasonable inspection of the transferred works to ascertain whether the terms of this contract are being satisfactorily executed by the District. Such inspection shall include examinations of the transferred property and the books, records, and papers of the District, together with examinations in the office of the

Bureau of Reclamation of all contracts, papers, plans, records and programs connected with the said property. The examinations and evaluations for operation and maintenance will be without cost to the District, except for such costs incurred by the District and/or its agents to provide access, to operate any mechanical or electrical equipment, and to participate in the examination of the project works. The actual cost to the United States for all other inspections shall be reimbursed by the District to the United States.

4. No substantial change in any of the transferred works shall be made by the District without first having had and obtained the written consent of the Secretary, and the Secretary's opinion as to whether any change in any of the transferred works is or is not substantial shall be conclusive and binding upon the parties hereto. The District shall promptly make any and all repairs to the transferred works which in the opinion of the Secretary are deemed necessary for the proper care, operation and maintenance of the transferred works, or may cause the repairs to be made and charge the cost thereof to the District, and the District shall make, levy and collect sufficient operation and maintenance assessments to pay the same to the United States in addition to providing the necessary funds to meet the other obligations of the District. The cost to the United States of making any of the repairs contemplated by this article shall be repaid by the District to the United States together with and in addition to the first installment of charges falling due hereunder thereafter.

5. The District shall save the United States, its officers, agents, servants, and attorneys, harmless as to any and all damages which may in any manner grow out of the care, operation and maintenance of the transferred works.

6. This agreement shall not be utilized by the United States or the District in *Truckee-Carson Irrigation District v. Secretary of the Department of the Interior v. Pyramid Lake Paiute Tribe of Indians*, Civ. No. R-74-34 BRT (D.Nev.) or in the appeal of said case or in *United States v. Truckee-Carson Irrigation District*, No. S-78-611 MLS (E.D.Cal.) or in any other litigation.

7. If the final result of the appeal in the case of *Truckee-Carson Irrigation District v. Secretary of the Department of the Interior v. Pyramid Lake Paiute Tribe of Indians*, Civ. No. R-74-34 BRT (D.Nev.) is a reversal in whole or in part of the district court's order, it is agreed that this agreement shall not be construed to affect the December 18, 1926 contract.

8. The United States or TCID have the option to terminate this agreement by giving 45 days prior written notice of termination. Termination shall be effective on the 46th day after notice.

9. Any notice, demand, or request authorized or required by this contract, shall be deemed to have been given, on behalf of the United States, when mailed, postage prepaid, to Truckee-Carson Irrigation District at Newlands Project, P.O. Box 1356, Fallon, Nevada 89406, or to the United States when mailed, postage prepaid to the Regional Director, Mid-Pacific Region, Bureau of Reclamation, 2800 Cottage Way, Sacramento, CA 95823.

Dated: February 14, 1984

/s/ David S. Houston
Regional Director
Mid-Pacific Region
Bureau of Reclamation

/s/ Ygnacio H. Laca
President
Board of Directors
Truckee-Carson Irrigation District